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84-1294

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

THE VILLAGES, INC.,
Petitioner,

v.

THE METROPOLITAN DEVELOPMENT COMMISSION
OF MARION COUNTY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA, THIRD DISTRICT

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QUESTION PRESENTED

This petition squarely presents the following question: Whether construction of a zoning ordinance to prohibit a married couple and several foster children from residing together as a single housekeeping unit in a home situated in an area zoned for one family dwelling constitutes

(a) a deprivation of property without due process of law,

(b) a violation of the equal protection of the laws, or

(c) an infringment of the rights of association, privacy, and family integrity.

PARTIES BELOW

The caption of the case contains the names of all parties to the proceeding. Petitioner, The Villages, Inc., is a Kansas not-for-profit corporation doing business in the State of Indiana. Respondent, The Metropolitan Development Commission of Marion County ("Commission"), is a governmental entity established by state statute, Ind. Code 36-7-4-202(c), for a consolidated city. Indianapolis is the only consolidated city in Indiana.

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THE METROPOLITAN DEVELOPMENT COMMISSION OF MARION COUNTY,

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA, THIRD DISTRICT

Petitioner, The Villages, Inc. ("The Villages"), respectfully prays that a writ of certiorari issue to review the judgment and opinion entered by the Court of Appeals of Indiana, Third District, in this cause on June 13, 1984, the Supreme Court of Indiana having denied The Villages' petition to transfer on November 15, 1984.

REPORTS OF OPINIONS BELOW

The opinion of the Municipal Court of Marion County, Room No. 12, is not reported, but is reproduced in the Appendix. App. 17a. The majority and dissenting opinions of the Court of Appeals of Indiana, Third District, are reported at 464 N.E.2d 367. App. 1a-16a. The split decision of the Supreme Court of Indiana, denying transfer, is also included in the Appendix. App. 34a.

JURISDICTION

Jurisdiction to review the judgment below is invoked pursuant to 28 U.S.C. § 1257(3). The judgment of the Court of Appeals of Indiana was entered on June 13, 1984. App. 1a. A timely petition for rehearing in the Court of Appeals was denied on July 17, 1984. App. 33a. A timely petition to transfer to the Supreme Court of Indiana was denied by an order dated November 15, 1984. App. 34a. This petition is timely under 28 U.S.C. § 2101(c), having been filed within 90 days of the date upon which the Supreme Court of Indiana denied discretionary review.

CONSTITUTIONAL PROVISIONS AND ORDINANCE INVOLVED

Amendment IX, United States Constitution

"The Enumeration in the Constitution, of Certain Rights, Shall Not be Construed to Deny or Disparage Others Retained by the People."

Amendment XIV, Section 1, United States Constitution

"No State Shall . . . Deprive Any Person of Life, Liberty, or Property Without Due Process of Law; Nor Deny to Any Person Within its Jurisdiction the Equal Protection of the Laws."

Relevant portions of the zoning ordinance involved, *Dwelling Districts Ordinance of Marion County, Indiana*, are set forth in the Appendix at pages 36a-50a.

STATEMENT OF THE CASE

A. *Facts*

This case focuses upon the right of a married couple and a reasonable number of foster children to make their home, as a single-housekeeping unit, in a house situated in an area zoned for one-family dwellings. The Villages has been providing homes for orphans and abused, aban-

doned, or neglected children throughout the Midwest since the 1960s. With the aid and encouragement of private philanthropic funding grants, The Villages began establishing several homes for foster children in Indiana in 1980.

The Villages unites children with foster parents who will care for their emotional, nutritional, and other needs on a permanent basis, just as natural parents would do, in a home setting which in every respect mirrors a traditional family residence. The foster parents reside in a home provided by The Villages on an around-the-clock basis. The home serves as their exclusive residence. The home also serves as the permanent home for the children as long as it is in their best interests, usually until graduation from high school. Trial Court Decision, App. 19a-20a.

Great care is taken to determine each child's "willingness, ability and commitment to live in and contribute to a family environment and to remain in the home through high school graduation." *Id.* The children attend the same local schools as other neighborhood children.

In the fall of 1982, The Villages found a large house in a residential area of Indianapolis ideally suited for a family. The home had been previously occupied by a married couple and their eleven children. *Id.* at 19a. The Villages closed the purchase of the property after receiving advice from legal counsel that the foster family use it contemplated for the dwelling was permissible under the local zoning ordinance.[1]

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[1] Only after The Villages had entered an unconditional agreement to purchase the property in October, 1982, did zoning authorities first assert that residential zoning was somehow inappropriate for foster family use of the home. Counsel for The Villages then wrote the zoning authorities explaining how the Villages' proposed use fitted within the applicable ordinance. The letter went unanswered for over a month and The Villages closed the real estate purchase as required by its contract. After the closing, zoning authorities reasserted their position that The Villages' proposed use was illegal. Trial Court Decision, App. 20a-21a.

The Commission instituted this action in the Municipal Court of Marion County, Room No. 12, on March 1, 1983, seeking a preliminary and permanent injunction barring the proposed use of The Villages' property by the foster family, contending that the use was not permitted under the local zoning ordinance which limits the property in question to a "one-family dwelling" use. App. 39a. The ordinance does not contain a definition of "family" or "one-family."

On March 9, 1983, a full hearing was conducted by the trial court and on April 18, 1983, the trial court issued its opinion, including detailed findings of fact and conclusions of law, and entered final judgment in favor of The Villages, ruling that the proposed use of the home by a foster family fit comfortably within the meaning of "one-family." The trial court's findings of fact have never been challenged below.

The trial court found that the "house-parents and the foster children will keep and maintain the house as a single-housekeeping unit, having one kitchen, eating together at mealtime, celebrating holidays together, and enjoying vacations together." "[T]he house will be utilized by persons living there as a family, as a single-housekeeping unit and as their sole personal residence." App. 19a, 22a. The trial court further found that The Villages' proposed use of the home "will have every appearance of a one-family dwelling" and that the purpose in establishing the residence was "to emulate a stable family environment for children who would otherwise not have one." *Id.* at 19a-20a.

The trial court, observing that the applicable zoning ordinance lacked any specific definition of "family," canvassed case law from other jurisdictions interpreting similar ordinances. The trial court expressly recognized the basic premise that the term family should be interpreted broadly in order to avoid the constitutional infirmity pre-

sented by a narrow construction, relying upon the following statement in *Saunders v. Clark County Zoning Department*, 66 Ohio St.2d 259, 421 N.E.2d 152, 155 (1981):

> In our view, any resolution seeking to define this term narrowly would unconstitutionally intrude upon an individual's right to choose the family living arrangement best suited to him and his loved ones. *Moore v. East Cleveland* (1977), 431 U.S. 494, 499. . . .

App. 24a (parallel citations omitted).

The trial judge further recognized that the "pursuit of the goal of a '. . . quiet place where yards are wide, people few, and motor vehicles restricted . . .' is a legitimate interest of land use regulation. *Village of Belle Terre v. Boraas*, 416 U.S. 1 . . . [a]nd the term 'family' must be defined within that context." App. 24a-25a. The court below found that the interests of the foster children were identical to these legitimate state interests underlying single-family zoning districts, observing that the tranquil characteristics of single-family districts attracted the foster family to the area and that the "needs and desires [of the existing residents and the foster family] . . . are the same—a quiet peaceful neighborhood." App. 25a.

The trial judge concluded that a compelling governmental interest would be required to justify a definition of family which would exclude a foster family from residing in a home owned by The Villages in the one-family dwelling zoning district, quoting from *Saunders v. Clark County Zoning Department, supra*, 421 N.E.2d at 155-56:

> A family unit, which performs a social function of child-rearing, regardless of its relationship or composition or whether it includes foster children as well as natural children, is constitutionally protected against governmental intrusion not supported by a compelling governmental interest. *Smith v. Organization of Foster Families* (1977), 431 U.S. 816, 844-845 . . .; *Wisconsin v. Yoder* [406 U.S. 205 (1972)];

> *Meyer v. Nebraska* (1923), 262 U.S. 390, 399-401 . . .; 91 Harv. L. Rev. 1427, 1571-1574.

App. 30a (parallel citations omitted). Not surprisingly, the court below found such a compelling governmental interest lacking in this case. *Id.*

The Commission appealed, and a divided panel of the Court of Appeals of Indiana reversed the judgment of the trial court. 464 N.E.2d 367 (1984). The majority did not disturb any of the trial court's findings of fact. Instead, based on its analysis of the language of the zoning ordinance, the majority concluded that the foster family did not constitute a "family" within the meaning of the ordinance as a matter of law, primarily relying upon the legal maxim *expressio unius est exclusio alterius.* The majority opinion brushes by the significant constitutional issues raised by The Villages in holding:

> Local governments may reasonably restrict the use of land into districts for the promotion of public health, safety, morals, and welfare. *Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365. . . . The police power of local legislative bodies may be properly used to limit the number of non-related persons inhabiting homes and residential districts without violating constitutional rights. *Village of Belle Terre v. Boraas,* (1974) 416 U.S. 1 . . .; *see also Moore v. Cleveland,* (1977) 431 U.S. 494. . . . Thus, the issue at bar is not constitutional in nature, but instead involves a question of statutory interpretation.

464 N.E.2d at 368-69 (parallel citations omitted); App. 3a.

Relying upon decisions from numerous other jurisdictions, and accusing the majority of attempting "to evade" *Saunders* and other cited cases, the dissent concluded that the contemplated use of the residence as a home for foster children "in a simulated family environment constitutes a single-family dwelling within the restrictions of the zoning ordinance." *Id.* at 371 (Ratliff, J., dissenting); App. 9a.

By a vote of 3-2, the Supreme Court of Indiana denied The Villages' petition to transfer (discretionary review), with the two dissenting judges voting to grant transfer, reverse the decision of the Court of Appeals and affirm the trial court. This Petition for a Writ of Certiorari follows.[2]

B. *Raising the Federal Questions*

The Villages raised the federal questions sought to be reviewed at every stage of the state court proceedings. The Villages argued in the trial court that application of the ordinance to exclude a foster family from residing in a one-family dwelling district would constitute a violation of the due process and equal protection clauses, and infringe fundamental liberties of association, privacy, and family integrity. App. 51a-52a. The trial court agreed with The Villages' contention that a narrow construction of the statute excluding this foster family from the one-family dwelling district would violate fundamental constitutional rights, and found no compelling state interest to justify such an infringement. *See supra* at 5-6; App. 30a. The Villages repeated its constitutional arguments in defense of the trial court judgment in its brief on appeal before the Court of Appeals of Indiana, App. 53a-54a, in its Petition for Rehearing before the Court of Appeals, App. 55a-56a, and in its Petition for Transfer to the Supreme Court of Indiana, App. 57a-58a. The majority of the Court of Appeals rejected The Villages' constitutional arguments in a cursory fashion, *see supra* at 6, App. 3a, and by the narrowest of margins the Supreme Court of Indiana declined to exercise its discretion to grant transfer of the case.

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[2] As a result of proceedings in this case in the trial court and the Court of Appeals subsequent to the denial of transfer by the Supreme Court of Indiana, The Villages is being required to remove the foster family from the home by June 30, 1985.

REASONS THE WRIT SHOULD BE GRANTED

This case challenges the power of the state to exclude a foster family which is functionally identical to a family of related persons from an area restricted by a zoning ordinance to one-family dwelling uses. The issue arises with increasing frequency in recent times and has nationwide practical significance. In light of the *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), and *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), decisions, this issue possesses a doctrinal importance transcending the immediate factual situation, and currently is the subject of conflicting decisions by both state and lower federal courts.

Virtually all municipalities in this Nation commonly reserve large areas within their jurisdiction for use by single-family residences through exercise of their zoning authority. Annot., 71 A.L.R.3d 693 (1976). The question of what constitutes a family under these ordinances has been a fertile source of litigation. *Id.* Many ordinances explicitly impose a requirement that the individuals residing together in a single-family district be biologically related to one another.

A zoning ordinance which establishes a single-family district is unconstitutional if applied to exclude a foster family from residing in the single-family zoning district. Application of such an ordinance to exclude residential use by the foster family is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare" under the test of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). It is equally invalid under the Equal Protection Clause, irrespective of what level of scrutiny is applied.[3] The distinction between foster families and related

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[3] Currently pending before the Court is *City of Cleburne v. Cleburne Living Center*, 726 F.2d 191 (5th Cir. 1984), *cert. granted*, 105 S. Ct. 427 (1984), which also involves the application of a zoning ordinance excluding a group of unrelated persons from a residential zoning district. Although the facts of *Cleburne* may

families fails to survive even minimal scrutiny in the context of a single-family zoning ordinance, since it is not "rationally related to a legitimate governmental interest," *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973), and further fails to survive the demanding standard of scrutiny more appropriate in this case, *see Plyler v. Doe*, 457 U.S. 202 (1982).

Finally, exclusion of foster families from single-family districts violates in a most basic fashion the rights of association, privacy, and family integrity of the foster parents and foster children and does not serve a countervailing compelling governmental interest. *See, e.g., Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

Before analyzing the questions presented, it should be emphasized what this case does not involve. The Villages does not challenge the legitimacy of single-family zoning districts. To the contrary, The Villages seeks the same desirable protection afforded to families residing in such districts. Moreover, The Villages does not contend that the state has an affirmative constitutional obligation to place displaced children in a traditional home setting or in the least restrictive environment possible. Rather, The Villages contends that the private efforts of citizens to provide a family and a home for displaced children are protected against irrational and arbitrary interference by the state, and that a married couple attempting to establish a family with foster children is protected against state interference not supported by a compelling governmental interest.

A. THE DECISION BELOW CONFLICTS WITH OTHER DECISIONS ON THE SAME ISSUE

The decision below is in direct conflict with decisions in other jurisdictions which hold that exclusion of foster families from single-family residency districts is uncon-

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lead to a different result, it becomes apparent that a hold of the instant petition may be in order for the reasons more fully discussed in the text below at pages 21-22.

stitutional, either on the due process ground that no legitimate state interest in zoning is rationally served by such an exclusion, *Children's Home of Easton v. City of Easton*, 53 Pa. Commw. 216, 417 A.2d 830, 833 (1980); *Hopkins v. Zoning Hearing Board of Abington Township*, 55 Pa. Commw. 365, 423 A.2d 1082, 1084-85 (1980); *Berger v. State*, 71 N.J. 206, 364 A.2d 993, 1002 (1976); *see Village of University Heights v. Cleveland Jewish Orphans' Home*, 20 F.2d 743, 745 (6th Cir.), *cert. denied*, 275 U.S. 569 (1927), or on the ground that such an exclusion would unconstitutionally intrude upon an individual's right to choose the family living arrangement best suited to him and his loved ones, *Saunders v. Clark County Zoning Department*, 66 Ohio St.2d 259, 421 N.E.2d 152, 155-56 (1981).

The decision below is also in conflict with decisions in other jurisdictions holding that a foster family consisting of a married couple and foster children who reside together as a single housekeeping unit meets the definition of a single-family residence even under an ordinance which *explicitly* contains a requirement that the individuals be related. *Children's Aid Society v. Zoning Board of Adjustment*, 44 Pa. Commw. 123, 402 A.2d 1162 (1979); *Group House of Port Washington v. Board of Zoning*, 45 N.Y.2d 266, 380 N.E.2d 207 (1978); *Hessling v. City of Broomfield*, 193 Colo. 124, 563 P.2d 12 (1977); *State ex rel. Ellis v. Liddle*, 520 S.W.2d 644 (Mo. App. 1975); *City of White Plains v. Ferraioli*, 34 N.Y.2d 300, 313 N.E.2d 756 (1974); *cf. Hamner v. Best*, 656 S.W.2d 253 (Ky. App. 1983) (where ordinance lacked definition of single family). While these cases may not expressly rest their judgments on constitutional grounds, they nevertheless bear on the constitutional questions presented by the case at bar. These cases hold, even in the face of a single-family zoning ordinance expressly requiring that the individuals comprising the household be related, that a foster home of unrelated individuals functionally identical to the families permitted to reside in the district by the statute, are likewise families within the meaning of

the statute. The basic thrust of these cases is that it is irrational and arbitrary to exclude from an area zoned exclusively for families a family unit which in every material respect constitutes a family and advances the purposes which the zoning ordinance serves.

Finally, the decision below is in conflict with decisions in other jurisdictions declaring invalid on state constitutional grounds requirements that individuals residing in a single-family zoning district be related. *McMinn v. Town of Oyster Bay*, —— N.E.2d ——, N.Y.L.J., December 26, 1984, p. 1, col. 4 (Sup.Ct., App. Div., 2nd Dept. 1984); *Charter Township of Delta v. Dinolfo*, 419 *Mich.* 253, 351 N.W.2d 831 (1984); *City of Santa Barbara v. Adamson*, 164 Cal.Rptr. 539, 610 P.2d 436 (1980); *State v. Baker*, 81 N.J. 99, 405 A.2d 368 (1979); *Holy Name Hospital v. Montroy*, 153 N.J. Super. 181, 379 A.2d 299 (1977). While these cases seem to meet the "plain statement" requirement of *Michigan v. Long*, 463 U.S. 1032 (1983), and hence in an abstract, jurisprudential sense decide no federal constitutional question, the conclusions and analysis of these cases are irreconcilable with the decision below, and it seems plain that, were these state courts to reach the federal constitutional question presented in this case, they would resolve it in a way which conflicts with the decision below. Indeed, in *Charter Township of Delta v. Dinolfo*, *supra*, the Supreme Court of Michigan expressly recognized that the rational relationship test it was applying under the state constitution was the same test required by the Constitution of the United States, and that the state test had its roots in federal constitutional law. 351 N.W.2d at 843 n.7. Similarly, in *State v. Baker*, *supra*, and *Holy Name Hospital v. Montroy*, *supra*, the court struck down zoning ordinances applying the same substantive test which is applicable to a federal constitutional challenge.[4]

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[4] This Court has recently encouraged state courts to rest their judgments on state grounds. *E.g.*, *Michigan v. Long*, 463 U.S. 1032

The conflict in decisions on the questions presented by this case is just one manifestation of the lower courts' difficulty in reconciling this Court's decisions in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), and *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). *See generally* Annot., 12 A.L.R.4th 238 (1983). Indeed, *Belle Terre* has been widely criticized by the commentators,[5] and courts and commentators alike question whether *Belle Terre* still does declare federal law after this Court's decision in *Moore*. Uncertainty on this issue abounds. *See, e.g., City of Santa Barbara v. Adamson, supra*, 610 P.2d at 440 n.3; *State v. Baker, supra*, 405 A.2d at 374; L. Tribe, *American Constitutional Law*, Sec-

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(1983); *Massachusetts v. Upton*, 104 S. Ct. 2085 (1984) (Stevens, J., concurring in the judgment); *see generally* Brennan, *State Constitutions in the Protection of Individual Rights*, 90 Harv. L. Rev. 498 (1977). The cases cited in the text demonstrate that the state courts are responding to this encouragement. This development, however, necessarily means that there will be fewer state court judgments on the merits of federal constitutional issues, and hence it will be increasingly difficult to demonstrate a conflict in the decisions of the state courts on federal constitutional issues of the same scope which may have been required in the past. *See* Supreme Court Rule 17.1(b). Accordingly, this Court should examine state court decisions resting on parallel state constitutional provisions in ascertaining the scope of a conflict on an important question of corresponding federal constitutional law, particularly where, as in this case, the state courts are applying the same substantive test which would be required on the federal constitutional question. The fact that this Court lacks jurisdiction to review those state court judgments does not preclude this sort of consideration. Failure to consider such state court decisions in ascertaining the scope of conflict would insulate many questions from review where the absence of a conflict, or the apparent limited nature of a conflict, is wholly illusory.

[5] *See, e.g.*, Williams and Doughty, *Studies in Legal Realism: Mount Laurel, Belle Terre, and Berman*, 29 Rutgers L. Rev. 73, 76-82 (1975); Hartman, *Village of Belle Terre v. Boraas: Belle Terre is a Nice Place to Visit—But Only 'Families' May Live There*, 8 Urb. L. Ann. 193 (1974); Note, *Village of Belle Terre v. Boraas: A Sanctuary for People*, 9 U.S.F.L. Rev. 391 (1974).

tion 15-18, at 974, Section 15-21, at 989 (1978); Carlin, *Moore v. City of East Cleveland: Freedom of Personal Choice for the Extended Family*, 10 Sw. U. L. Rev. 651 (1978); Perry, *Modern Equal Protection: a conceptualization and appraisal*, 79 Colum. L. Rev. 1023, 1073 (1979); Comment, 91 Harv. L. Rev. 1427, 1576-78 (1978).[6]

As will be demonstrated below, the decision of the divided panel of the Court of Appeals of Indiana in this case is inconsistent with the constitutional teachings of the applicable decisions of this Court. This case presents important questions which have not been, but which should be, resolved by this Court.

B. A ZONING ORDINANCE PROHIBITING A FOSTER FAMILY FROM RESIDING TOGETHER AS A SINGLE HOUSEKEEPING UNIT IN AN AREA ZONED FOR ONE-FAMILY DWELLINGS CONSTITUTES A DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW

While the power of local governments to control land use is broad, "the zoning power is not infinite and unchallengeable; it 'must be exercised within constitutional limits.'" *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 67 (1981) (citation omitted).[7]

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[6] The widespread uncertainty with respect to the federal constitutional doctrine applicable to exertions of the zoning power in a fashion which limits the compositions of households appears to be another reason why state courts are resting their judgments on state constitutional grounds.

[7] The Court of Appeals' decision in this case fails to recognize this unassailable proposition, essentially concluding that because an exercise of the zoning power is involved, no constitutional question is presented. *See* App. 3a. This basic error in reasoning by the Court of Appeals of Indiana may not warrant this Court's review, but the substantive arguments which petitioner raised below, which were never addressed by the Court of Appeals, plainly do merit review by this Court.

In this Court's seminal decision analyzing the limitations placed upon the exercise of zoning powers by the Due Process Clause of the Fourteenth Amendment, the Court recognized that the "line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926). Borrowing from the law of nuisance, the Court reasoned that the question of whether zoning power could be legitimately used to forbid a particular use of property is to be determined not by abstract consideration of the use, "but by considering it in connection with the circumstances and locality," noting that a "nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard." *Id.*

Euclid established that a zoning restriction constitutes a deprivation of property without due process of law where the distinction drawn by the ordinance between the prohibited use and the permitted use is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." *Id.* at 395. *Euclid* also recognized that such a determination must be made in light of contemporary society. In noting that regulations which would have been rejected as arbitrary and oppressive in a previous time were then being universally sustained, the Court observed that:

> While the meaning of constitutional guarantees never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.

Id. at 387.

The basic test established by *Euclid* to determine the validity of zoning ordinances affecting property interests

remains the controlling standard today. *E.g.*, *Schad v. Borough of Mt. Ephraim*, *supra*, 452 U.S. at 67; *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). The content of any such general test, however, "is not revealed simply by its literal text, but rather is given meaning through the evolutionary process of common law adjudication. . . ." *Bose Corp. v. Consumers Union of United States, Inc.*, 104 S. Ct. 1949, 1960 (1984).[8]

This Court provided just such additional content to the *Euclid* rule in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), a case dealing with the collective housing of college students. In upholding against a facial attack the constitutionality of a single-family zoning ordinance which required the occupants of the dwellings in the district to be related, the Court observed that the ordinance established "zones where family values, use values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Id.* at 9.

By way of contrast, the Court noted that *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928), struck down a zoning ordinance prohibiting a philanthropic "home for children or old people" in a residential district unless the surrounding property owners consented to the use. The Court in *Belle Terre* observed that the *Roberge* Court "concluded that the . . . ordinance was invalid since the proposed home for the aged was not shown by its maintenance and construction 'to work

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[8] While cases which merely involve the application of settled principles of constitutional law to the facts of a particular case often do not warrant this Court's review, in a case such as this—where the content of the rule gains true meaning only through case-by-case adjudication—review is warranted where either (a) the factual setting is a common one spawning significant litigation and conflicting decisions, or (b) application of the rule in the particular factual setting significantly clarifies the fundamental questions posed by the rule or sheds new light on additional factors implicated by the rule. As demonstrated in the text, this case meets both of these requirements.

any injury, inconvenience or annoyance to the community, the district or any person' 278 U.S., at 122." 416 U.S. at 7.[9]

The case at bar, unlike *Belle Terre*, involves an as-applied challenge to a zoning ordinance such as that involved in *Nectow v. City of Cambridge*, 277 U.S. 183

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[9] *Roberge* is generally cited as holding the ordinance unconstitutional on the ground that the surrounding owners could withhold consent for arbitrary reasons. *See, e.g., City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 677-78 (1976). That certainly is the express holding of the case, *see Washington ex rel. Seattle Title Trust Co. v. Roberge, supra*, 278 U.S. at 118, and the Court in *Belle Terre* recognized that holding, *see* 416 U.S. at 6-7. As indicated in the quotation in the text, the *Roberge* Court indeed did conclude that it had not been shown that the home for the aged poor would work any inconvenience or annoyance to the community, but *Roberge* made this statement in noting that the proposed home would not be a nuisance. *Washington ex rel. Seattle Title Trust Co. v. Roberge, supra*, 278 U.S. at 122. The *Roberge* Court, however, further expressly stated that it "need not decide whether, consistently with the Fourteenth Amendment, it is within the power of the state or municipality by a general zoning law to exclude the proposed new home from a district defined" as was the district in the ordinance under consideration. *Id.* at 123.

It would thus appear that the *Belle Terre* Court's statement that the *Roberge* Court concluded that the ordinance in *Roberge* was "invalid" because it was not shown to constitute a nuisance is somewhat of an overstatement. For this reason, petitioner does not directly rely upon *Roberge* as controlling authority on the due process question presented by this case. Petitioner does maintain, however, that if the *Roberge* Court had reached the due process question, it would have reached the conclusion attributed to it by the *Belle Terre* Court, and held the ordinance invalid as applied even if the surrounding owners consent provision had not been present in the ordinance. Indeed, in *Women's Kansas City St. Andrew Society v. Kansas City, Mo.*, 58 F.2d 593 (8th Cir. 1932), the court decided the question expressly reserved in *Roberge*, and held that the exclusion of a philanthropic "old lady's home" from a residential district constituted a deprivation of property without due process of law because of the absence of a showing of any relationship between the proposed home and the public health, safety, morals and general welfare of the public.

(1927).[10] Moreover, in this case, unlike *Belle Terre*, the legitimacy of the basic governmental interest served by a single-family residency requirement is not challenged. Rather, the question in this case is whether the proposed foster family use of the property "is so different in character from concededly legitimate uses as to bring it within the scope of the police power of the municipality." *Village of University Heights v. Cleveland Jewish Orphans' Home*, 20 F.2d 743, 745 (6th Cir.), *cert. denied*, 275 U.S. 569 (1927). This Court has rendered few decisions elucidating this aspect of the *Euclid* test, but yet the continuing vitality of the test depends upon consistent and principled application of this component. The case at bar presents a classic opportunity for this Court to give needed constitutional guidance to relieve the uncertainty, confusion and conflict which currently permeates land use legislation and related court decisions excluding some persons from living in residential areas.

In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), the Court had the opportunity to expound further upon the basic *Euclid* test, but the plurality, recognizing that fundamental liberty interests were at stake in that case, and further recognizing that the standard of review is determined by the nature of the right assertedly threatened or violated, rather than the power being

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[10] The fact that this case involves an as-applied challenge does not render the petition fact-bound. This Court routinely reviews as-applied challenges to statutes. Indeed, such challenges are the preferred constitutional adjudication under the *Ashwander* rules. *See generally Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring). Moreover, review in this case is warranted given the failure of lower courts to distinguish between general challenges to the overall validity of a zoning ordinance and as-applied challenges. The decision of the court below is one manifestation of this problem. Finally, a decision on an as-applied challenge is naturally binding precedent in any subsequent case that is analytically undistinguishable from it and hence is an enduring contribution to the law.

exercised or the specific limitation imposed, *e.g.*, *Schad v. Borough of Mt. Ephraim*, *supra*, 452 U.S. at 67; *Thomas v. Collins*, 323 U.S. 516, 529-30 (1944), applied a more demanding standard of review to the zoning ordinance at issue. In *Moore*, a single-family zoning ordinance defined family in a manner that prevented more distant relatives from living together. The plurality concluded that the ordinance impermissibly infringed upon fundamental liberty interests. 431 U.S. at 499.[11] Justice Stevens, however, concurring in the judgment, concluded that the ordinance was unconstitutional as applied, because the prohibition against certain relatives occupying a single-family dwelling had no substantial relation to the public health, safety, morals, or general welfare and hence constituted a deprivation of property without due process of law under *Euclid*. 431 U.S. at 515-18.[12]

Justice Stevens explicitly endorsed the reasoning and conclusions of a number of lower court opinions, *City of Des Plaines v. Trottner*, 34 Ill.2d 432, 216 N.E.2d 116 (1966); *City of White Plaines v. Ferraioli*, 34 N.Y.2d 300, 313 N.E.2d 756 (1974); *Kirsch Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 281 A.2d 513 (1971); *Village of University Heights v. Cleveland Jewish Orphans' Home*, 20 F.2d 743 (6th Cir. 1927), *cert. denied*, 275 U.S. 569 (1927), permitting unrelated persons to occupy single-family residences notwithstanding an ordinance prohibiting, either expressly or implicitly, such occupancy. 431 U.S. at 516-18.[13]

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[11] These same fundamental liberty interests are also at stake in the instant case. *See infra* at 23-29.

[12] Significantly, it was observed that litigation involving single-family zoning ordinances is common, 431 U.S. at 515, and that the case-by-case development of the constitutional limits on the zoning power had largely taken place in the lower courts, *id.* at 514.

[13] Justice Stewart argued that the state cases relied upon by Justice Stevens for the most part dealt with state law issues con-

In the instant case, the application of a single-family zoning ordinance to exclude a foster family from the single-family district is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or public welfare." *Village of Euclid v. Ambler Realty Co.*, *supra*, 272 U.S. at 395. Considering petitioner's proposed use "in connection with the circumstances and the locality" *id.* at 388, a foster family consisting of a married couple and a reasonable number of foster children which resides in a single-family residential district cannot be deemed a "right thing in the wrong place," *id.*, but instead is a right thing in the right place —the very place where it must be if this family and the persons of which it consists are to thrive as the basic element of our society. The trial court's unchallenged findings in this case permit no other conclusion.[14] Indeed, the trial court recognized, as have other courts, that a foster family "might actually support and further those values even more effectively than certain natural families." App. 27a; *Group House of Port Washington v.*

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cerning the proper statutory construction of the term family, but did not establish that narrow definitions of the term family were unconstitutional. 431 U.S. at 540, n.10. As explained, *supra*, at 10-11, even those state cases which expressly analyzed the question in terms of statutory construction support the substantive constitutional argument that a more restrictive definition of the term family would be arbitrary. The basic point is that in construing the statutory term, the courts ascertained the legitimate state interests and then concluded that the occupancy by the particular unrelated individuals in the cases before them could not rationally be viewed to violate those interests. Hence, the courts concluded that the legislature rationally would not have intended to exclude such individuals from the area. Such an analysis, while framed in the language of statutory construction, is of course precisely the substantive due process test mandated by *Euclid*.

[14] It must once again be emphasized that this petition is not fact-bound. The facts as found by the trial court in this case would necessarily be true of any foster family consisting of a married couple and children permanently residing in a home as a single-housekeeping unit.

Board of Zoning and Appeals of the Town of North Hempstead, 45 N.Y.2d 266, 380 N.E.2d 207 (1978).[15]

The Villages purchased a home in a neighborhood zoned as a sanctuary for families with children and has devoted sole use of that residence to serve as a sanctuary for a family with children. The fact that the health, safety, convenience, and general welfare of the inhabitants of that neighborhood would not be promoted by the exclusion of the foster home "is determinative of the case." *Nectow v. City of Cambridge, supra*, 277 U.S. at 448. The Villages' foster home is simply not "a pig in the parlor." *Village of Euclid v. Ambler Realty Co., supra*, 272 U.S. at 338.

C. EXCLUSION OF A FOSTER FAMILY FROM A ONE-FAMILY DWELLING DISTRICT VIOLATES THE EQUAL PROTECTION OF THE LAWS

The fundamental command of the Equal Protection Clause is that "the rights of all persons must rest upon the same rule under similar circumstances . . ." *Louisville Gas & Electric Co. v. Coleman, State Auditor*, 277 U.S. 32, 37 (1927) (citations omitted). The foregoing analysis, demonstrating a violation of due process under the *Euclid* test, also demonstrates a violation of the Equal Protection Clause under a rational basis test. *E.g., Moore*

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[15] The case at bar does not involve an institutional facility, or a group home established for housing adjudicated delinquents, *see generally Lakeside Youth Service v. Zoning Hearing Board of Upper Moreland Township*, 51 Pa. Commw. 485, 414 A.2d 1115 (1980); *Wengert v. Zoning Hearing Board of Upper Merion Township*, 51 Pa. Commw. 79, 414 A.2d 148 (1980), though it has been held that even an institutionally structured group home for children may not be excluded from a residential neighborhood consistent with due process. *See Village of University Heights v. Cleveland Jewish Orphans' Home, supra*; *cf. Women's Kansas City St. Andrew Society v. Kansas City, Mo., supra.* In the instant case the home is a classic single housekeeping unit, i.e., it has all of the characteristics and manifestations of the traditional family home, as expressly found by the trial court.

v. City of East Cleveland, supra, 431 U.S. at 540 n.10 (Stewart, J., dissenting). The distinction between foster families and families of related individuals made by the ordinance, as construed by the Court of Appeals of Indiana, is not rationally related to a legitimate governmental interest.

In *United States Department of Agriculture v. Moreno,* 413 U.S. 528, 534 (1973), this Court struck down just such an irrational classification. In *Moreno,* a provision of the Food Stamp Act excluded from participation any household containing an individual unrelated to another member of the household. Examining the purposes of the Food Stamp Act—to safeguard the health and well-being of low-income households—the Court recognized that the classification was clearly irrelevant to the purposes of the Act. *Id.* at 533-34.

The purpose of the zoning ordinance at bar is to create single-family neighborhoods, and the distinction imposed by the ordinance between foster families and families of related individuals is clearly irrelevant to the purpose of the ordinance. Similarly, any possible desire to further disadvantage hapless foster children, displaced from their natural families and pure victims of circumstance, would constitute an illegitimate governmental interest, even though such children may not constitute a suspect class.

Any equal protection analysis of the foster family home in the case at bar must recognize the pending case of *City of Cleburne v. Cleburne Living Center,* 726 F.2d 191 (5th Cir. 1984), *cert. granted,* 105 S. Ct. 427 (1984) (No. 84-468). *Cleburne* is factually far more difficult than the instant case, because it deals with a home for retarded persons in an essentially institutionalized setting. The parties in *Cleburne* have argued by briefs filed with the Court whether a quasi-suspect classification is correct *and* whether the rational basis test permits exclusion of retarded persons under *Village of Euclid v. Ambler Realty Co.,* and *Village of Belle Terre v. Boraas, supra.* Brief

for Petitioners, at 23-36, *City of Cleburne v. Cleburne Living Center, supra*; Brief for Respondents, at 9-25, *id.* The present status of *Cleburne* forces the conclusion that, if the Court does not grant certiorari in the instant case, then it should hold the instant petition pending decision in *Cleburne*, because the latter case may well give needed guidance on the limits of state power to exclude non-related persons from single-family zoning districts. This potential for guidance and the relatedness of the cases are nicely emphasized by the following quote from the *amicus curiae* brief filed in *Cleburne* by the United States:

> we readily concede that, if this case is remanded to the court of appeals for further consideration under what we urge is the appropriate constitutional standard [rational basis], that court may well supportably conclude that the denial of a special-use permit in this case was so wanting in rationality as to fail to pass muster under the Equal Protection Clause of the Fourteenth Amendment.

Brief for the United States as Amicus Curiae Supporting Reversal, at 6, *id.* If the Solicitor General suggests in *Cleburne* that no rational basis can support the exclusion from a residential area of a group of retarded persons in an institutional setting, surely the teachings of that case may well bear on the instant case which deals with the exclusion of foster children living in a home as a single housekeeping unit.

Finally, even if fundamental liberty interests were not implicated in this case, *see infra* at 23-29, at the very least an intermediate level of scrutiny is demanded. The interests of the foster children in this case, which petitioner clearly has standing to assert, *e.g.*, *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 841 n.44 (1977); *Pierce v. Society of Sisters*, 268 U.S. 510, 535-536 (1925); *see also Secretary of State of Maryland v. Joseph H. Munson, Co., Inc.*, 104 S. Ct. 2839, 2846-48 (1984), are serious ones, and the state's justification for excluding them from an environ-

ment which will contribute immeasurably to their cultural, spiritual, and educational well-being, certainly must be greater than the burden the state must shoulder to justify a building height limitation or setback regulation.

By distinguishing between foster children and those children fortunate enough to reside with their natural parents, the classification in this case "imposes a lifetime hardship on a discrete class of children not accountable for their disabling status." *Plyler v. Doe*, 457 U.S. 202, 102 S. Ct. 2382 (1982). "If the state is to deny a discrete group of innocent children" the sanctuary of an area dedicated to family values and youth values which "it offers to other children residing within its border, that denial must be justified by showing that it furthers some substantial state interest." *Id.*, 102 S. Ct. at 2402. No such showing was made in this case.[16]

D. EXCLUSION OF A FOSTER FAMILY FROM A ONE-FAMILY DWELLING DISTRICT INFRINGES UPON FUNDAMENTAL RIGHTS OF ASSOCIATION, PRIVACY, AND FAMILY INTEGRITY

This Court has "long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Roberts v. United States Jaycees*, 104 S. Ct. 3244, 3250 (1984). Freedom of personal choice in matters of family life has long been held a fundamental liberty protected by the Fourteenth Amendment. *E.g., Roberts v. United States Jaycees, supra*, 104 S. Ct. at 3250; *Santosky v.*

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[16] The Villages' standing to assert the interests of the children, is clear. *See* text, p. 22, *supra*. Morever, since the trial court adjudicated the merits of this constitutional argument, holding that a restrictive interpretation of the ordinance would violate the foster family's fundamental rights, there is no prudential reason for this Court not to review this question.

Kramer, 455 U.S. 745, 753 (1982); *Zablocki v. Redhail*, 434 U.S. 374, 383-86 (1978); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-40 (1974); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 433-86 (1965); *May v. Anderson*, 345 U.S. 528, 533 (1953), *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541-42 (1942); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 939 (1923).

The right to "establish a home," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), is at stake in this case. To be sure, the husband and wife, as foster parents, are not biologically related to the foster children, but the personal bonds they seek to establish are no less deserving of substantive protection. It is the "unique role in our society of the family, the institution by which 'we inculcate and pass down many of our most cherished values, moral and cultural,' *Moore v. City of East Cleveland*, 431 U.S. 494, 503-504", which accounts in large part for the special protection the institution of the family is accorded. Indeed, "the mere existence of a biological link" does not merit protection as a full-fledged liberty interest. *Lehr v. Robertson*, 463 U.S. 248, 103 S. Ct. 2985, 2993 (1983).

"[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot-[ing] a way of life' through the instruction of children as well as from the fact of blood relationship." *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 844 (1977) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 231-33 (1972)), *quoted with approval* in *Lehr v. Robertson, supra*, 103 S. Ct. at 2993.

The "freedom of association" is an "intrinsic element of personal liberty" and applies to a "broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State." *Roberts v. United States Jaycees*, *supra*, 104 S. Ct. at 3251. In cases establishing fundamental constitutional protection for certain formal family relationships, "the court has emphasized the paramount interest in the welfare of children. . . ." *Lehr v. Robertson*, *supra*, 103 S. Ct. at 2991. In this case, those interests of parents caring for children are just as implicated as they were in *Moore v. City of East Cleveland*, *supra*. Those interests are of a fundamental nature, and hence the attempted assertion of state power in this case must be justified by a compelling governmental interest. *Zablocki v. Redhail*, *supra*, 434 U.S. at 388.

In *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977), this Court expressly recognized that the foster family relationship may merit fundamental constitutional protection. *Id.* at 842-847. The Court observed that biological relationships are not exclusively determinative of the existence of a family, *id.* at 843, and stated "we cannot dismiss the foster family as a mere collection of unrelated individuals. Cf. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974)." 431 U.S. at 844-45. Moreover, the Court noted that the "legal status of families has never been regarded as controlling: 'Nor has the [Constitution] refused to recognize those family relationships unlegitimized by a marriage ceremony.' *Stanley v. Illinois*, 405 U.S., at 651." 431 U.S. at 845 n.53.

In *Smith*, however, the Court was confronted with a *procedural* due process challenge. Foster parents were asserting a liberty interest in a continued relationship with the foster children, even though they undertook the care for the children for only a limited period of time. In this context, the Court suggested that the foster *parents* could at most have a very limited constitutional lib-

erty interest, since any legitimate claim of entitlement to continued guardianship was severely circumscribed by their knowingly assumed contractual relationship with the state. 431 U.S. at 847.[17]

This case is distinguishable from the narrower pronouncements of *Smith*, because a functioning family unit claims protection against governmental interference "concerning family living arrangements." *Moore v. City of East Cleveland, supra*, 431 U.S. at 499. Prior cases announcing the fundamental liberty accorded to families "did not expressly consider the family relationship presented here . . . [,] [b]ut unless we close our eyes to basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's due process clause, we cannot avoid applying the force and rationale of these precedents to the fam-

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[17] *See Rivera v. Marcus*, 696 F.2d 1016 (2d Cir. 1982); *Drummond v. Fulton County Department of Family and Children Services*, 547 F.2d 835 (5th Cir.), *rev'd*, 563 F.2d 1200 (5th Cir. 1977) (en banc), *cert. denied*, 437 U.S. 910 (1978) (Brennan, J., & White, J., noting that they would grant certiorari); *Kyees v. County Department of Public Welfare of Tippecanoe County*, 600 F.2d 693 (7th Cir. 1979); *Sherrard v. Owens*, 644 F.2d 542 (6th Cir. 1981) (per curiam). The decisions of the courts of appeals in these procedural due process cases generally rejected a foster parent's claim to continued custody of the foster child, carefully limiting their holding to the precise procedural due process issue and facts presented.

However, recognition of a fundamental liberty interest in the foster family would pose no doctrinal problem in applying traditional procedural due process analysis. Assertion of state power on behalf of the natural parents—when in the best interests of the child—would serve a compelling state interest and hence justify the deprivation of the foster parent's liberty interest. Similarly, during the period in which a foster parent has a legitimate claim of entitlement to continued care of the foster children, a liberty interest may be recognized. The fact that it may have a temporal limit, does not render it any less fundamental and it is clear that liberty interests can be created through state law. *E.g., Wolff v. McDonnell*, 418 U.S. 539, 557 (1974).

ily choice involved in this case." *Id.* at 500-01.[18] The association involved in this case—private citizens coming forward to provide a home and a family for homeless children—is itself an institution of the family "deeply rooted in this Nation's history and tradition." *Id.* at 503 (footnote omitted).

It is dogma that infringement of a fundamental liberty interest may be justified only by a "compelling" governmental interest. *See, e.g., Zablocki v. Redhail, supra.* This case, however, may demonstrate that permitting cases to turn on the existence *vel non* of a fundamental liberty interest, together with the corresponding application of a compelling state interest test, is ill-advised. Indeed, in *Roberts v. United States Jaycees, supra*, this Court recognized that there is no bright line dividing associations which may merit heightened protection under the due process clause, but rather various relationships may be placed on a continuum.

The Villages suggests that the appropriate framework for reviewing a zoning regulation affecting the internal composition of households is set forth in *United States v. O'Brien*, 391 U.S. 367, 377 (1968):

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is

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[18] Significantly, Justice White, dissenting in *Moore*, agreed with the plurality that a protected liberty interest was effected in the case. 431 U.S. at 550. In Justice White's view, however, a key factor in sustaining the challenged ordinance was that it had an extremely limited geographical scope and that the parties were free to reside with one another in other parts of the metropolitan area. In contrast, the zoning ordinance in the instant case excludes the foster family from living together in a residential district anywhere in the metropolitan area. The City of Indianapolis is coterminous with Marion County, Indiana, as one of the geographically largest and most populated cities in the nation. *Statistical Abstract of the United States*, 29 (104th ed. 1984).

> unrelated to the suppression of free [association]; and if the incidental restriction on alleged [association] freedoms is no greater than is essential to the furtherance of that interest.

O'Brien, of course, set forth the framework for determining the validity of a content neutral time, place, or manner restriction on free speech. *See generally Clark v. Community for Creative Non-Violence*, 104 S. Ct. 3065, 3071-72 n.8 (1984); *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 104 S. Ct. 2118 (1984). These cases recognize that simply because an indisputably fundamental liberty interest is at stake—the First Amendment protection of free expression—the compelling state interest test is not necessarily required. Rather, certain kinds of regulations may be justified under the less demanding *O'Brien* test. This Court should recognize that, at a minimum, the same intermediate test is applicable in cases affecting fundamental rights to association, privacy, and family integrity. These rights stem, in part, from the First Amendment and are often, as in this case, subject to regulation which in essence is a time, place, and manner restriction on the exercise of those rights.[19]

The exclusion of foster families from single-family zoning districts clearly fails the *O'Brien* test. The zoning ordinance as applied by the Commission does not further

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[19] Indeed, in *Clark v. Community for Creative Non-Violence, supra*, the Court upheld a National Park Service regulation prohibiting camping in certain parks against First Amendment challenge when applied to prohibit demonstrators from sleeping in a park in connection with a demonstration intended to call attention to the plight of the homeless. This regulation had all the attributes of a zoning regulation, and the Court's analysis, conducted under the *O'Brien* framework, essentially involved an inquiry into the substantiality of the relationship of the restrictions on the use of the property in question and the legitimate governmental objectives —precisely the key inquiry in reviewing the legitimacy of the zoning restriction in this case.

an "important" or "substantial" governmental interest. Moreover, the restriction on free association is much greater than essential to further the legitimate state interest at stake. Analysis of the case at bar cannot overlook that the right to exist and flourish as a family unit including children is basic to the structure of our Nation and is to be encouraged rather than stifled.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted to review the judgment of the Court of Appeals of Indiana. In the alternative, the petition should be held pending disposition of *City of Cleburne v. Cleburne Living Center* (No. 84-468).

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF INDIANA
THIRD DISTRICT

No. 2-783 A 256

THE METROPOLITAN DEVELOPMENT
COMMISSION OF MARION COUNTY,
Appellant
(Plaintiff Below)

v.

THE VILLAGES, INC.,
Appellee
(Defendant Below)

[Filed June 13, 1984]

APPEAL FROM THE MUNICIPAL COURT OF MARION COUNTY
ROOM NO. TWELVE
HONORABLE DAVID A. JESTER, JUDGE
CAUSE NO. E1233-022

HOFFMAN, J.

The Metropolitan Development Commission of Marion County filed suit against The Villages, Inc., to enforce its zoning ordinance and enjoin use of a single-family residence as a "foster care facility." The trial court denied the Commission's application for preliminary injunction and granted The Villages' request for judgment on the merits. The Commission appeals that decision.

On January 10, 1983, The Villages purchased a single-family residence at 6135 N. Meridian Street in Indianapolis for use as a group home. The group home concept is relatively new, and serves the purpose of placing abused, abandoned, and neglected children in a simulated family environment. The Villages proposes to hire a married couple to act as foster parents for up to ten foster children. Children will be placed in the group home under separate contracts by the courts or government agencies. For each child cared for, The Villages will be reimbursed at the rate of $36 per day.

The property in question is zoned D-3 under the Dwelling Districts Zoning Ordinance (DDZO) of Marion County, which permits the following uses:

"1. ONE-FAMILY DWELLING, including Manufactured Homes as regulated in section 2.175.

2. TWO-FAMILY DWELLING, (permitted on corner lots only).

3. GROUP HOMES, as regulated in section 2.18.[1]

4. TEMPORARY USES, as regulated in section 2.14.

5. ACCESSORY USES, as regulated in section 2.15.

6. HOME OCCUPATIONS, as regulated in section 2.16."

---

[1] No one contends that The Villages proposes a "group home" as that term is defined in the Ordinance. The Ordinance carefully defines "group home" as caring for "developmentally disabled children." This group home provision of the Ordinance was added in 1981 by the City-County Council and is a narrow one applying only to children who have developmental disabilities, as defined by IND. CODE §§ 16-10-2.1-1 and 16-13-1-3. Thus, the Council chose a definition of group home which all parties agree did not include the use in the case at bar.

The DDZO specifically permits foster family care of children unrelated to residents by blood or adoption as an Accessory Use, under the following conditions:

"Accessory Uses:

a. Shall be customarily incidental accessory and subordinate to, and commonly associated with, the operation of the primary use of the lot.

b. Shall be operated and maintained under the same ownership and on the same lot as the primary use.

c. Shall be subordinate in area, extent, and purpose to the primary use of building served. . . ."

In its findings of fact and conclusions of law, the trial court specifically recognized the group home as one-family dwelling, entitled to operate in the D-3 district *as a matter of law*. The Commission now maintains that the proposed group home does not constitute a one-family dwelling under the provisions of the DDZO.

Local governments may reasonably restrict the use of land into districts for the promotion of public health, safety, morals, and welfare. *Euclid v. Ambler Realty Co.*, (1926) 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303. The police power of local legislative bodies may be properly used to limit the number of non-related persons inhabiting homes in residential districts without violating constitutional rights.

Village of Belle Terre v. Boraas, (1974) 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797;

see also, Moore v. Cleveland, (1977) 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531.

Thus, the issue at bar is not constitutional in nature, but instead involves a question of statutory interpretation.

The construction of a zoning ordinance, like other statutes, is a question of law. 101A C.J.S. Zoning and

Land Planning § 101. Courts may not interpret a statute or ordinance which is plain and unambiguous on its face. *Boone County State Bank v. Andrews*, (1983) —— Ind.App. ——, 446 N.E.2d 618. Where an ambiguity does arise, the zoning ordinance involved must be construed to ascertain and effectuate the intent of the local legislative body. *Bd. of Zoning v. New Testament Bible Church*, (1980) —— Ind.App. ——, 411 N.E.2d 681.

The term "family" is not defined in the DDZO. Normally, terms undefined within a statute must be given their plain, ordinary and usual meaning. *Sutto v. Board of Medical Regis. and Examination*, (1962) 242 Ind. 556, 180 N.E.2d 533. However, the word family has no less than twelve dictionary definitions and is not commonly associated with one plain or ordinary meaning. *See*, Webster's New Universal Unabridged Dictionary, Second Edition (1983).

In this instance, the legislative intent may be ascertained through intrinsic construction of the DDZO. Words and phrases in a single section of a statute or ordinance must be construed consistently and logically with other sections of the same act and with the act as a whole. *Ind. State Highway Comm. v. White*, (1973) 259 Ind. 690, 291 N.E.2d 550.

In this case, the legal maxim *expressio unius est exclusio alterius*[2] is particularly useful in ascertaining the

---

[2] Black's Law Dictionary (5th ed. 1979) defines *expressio unius est exclusio alterius* as follows:

> "A maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another. *Burgin v. Forbes*, 293 Ky. 456, 169 S.W.2d 321, 325; *Newblock v. Bowles*, 170 Okl. 487, 40 P.2d 1097, 1100. Mention of one thing implies exclusion of another. When certain persons or things are specified in a law, contract, or will, an intention to exclude all others from its operation may be inferred. Under this maxim, if statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded."

legislative intent. In construing a statute, it is equally important to recognize what is not said as it is to recognize what is said. *Van Orman v. State*, (1981) —— Ind.App. ——, 416 N.E.2d 1301. In drafting the DDZO, the local legislative body promulgated separate and specific provisions for single-family dwellings and for foster care within the D-3 district. The specific provision for foster care as an accessory use necessarily excludes foster care from the general section authorizing single-family dwellings. Any other construction renders this specific regulation of foster care superfluous. Local legislators would not logically provide for foster care as an accessory use if it were also contemplated as a single-family dwelling use. The trial court erred as a matter of law in finding The Villages' group home to be a single-family dwelling.

Nor does the group home qualify as an accessory use. Any accessory use must be subordinate in area, extent, and purpose to the primary use of the lot. The Villages is a corporation which intends to hire two houseparents to provide care for ten foster children. These children are placed in the group home under separate contracts, and The Villages is compensated at a rate of $36 per day per child. Obviously, foster care is not subordinate to, but actually is the primary use of the proposed group home. As such, the proposed group home is not permitted as an accessory use, nor is it allowed under any category within the D-3 district.[3]

The Villages contends that its position is supported by the weight of authority in other jurisdictions which have considered this question. Instead of addressing the specific terms of the challenged ordinance, this position relies upon the *results* reached in cases construing distinctly different ordinances. It is the duty of this Court to interpret the challenged ordinance, giving force and

[3] The parties have stipulated that none of the other four use categories is applicable.

effect to the language of the local legislature, without regard to results reached in cases which they may be clearly contrasted.

A majority of the cases cited may be distinguished on the basis that the ordinances concerned broadly define family to encompass unrelated individuals operating as a single-housekeeping unit.

> *E.g., Saunders v. Clark Cty. Zoning Dept.*, (1981) 66 Ohio St.2d 259, 421 N.E.2d 152.
>
> *See also*, Annot., 71 A.L.R.3d 697 (1976).

Other cases have recognized that group homes are entitled to locate in residential areas where state statute pre-empts local government from excluding this use.

> *Costley v. Caromin House, Inc.*, (1981) Minn., 313 N.W.2d 21;
>
> *Hessling v. Broomfield*, (1977) 193 Col. 124, 563 P.2d 12.

At least one jurisdiction has recognized group homes for foster children as a single-family use *per se*, regardless of zoning prohibitions.

> *Group House of Port Washington v. Board of Zoning*, (1978) 45 N.Y.2d 266, 380 N.E.2d 207;
>
> *White Plains v. Ferraioli*, (1974) 34 N.Y.2d 300, 313 N.E.2d 756.

The New York cases clearly establish a right which exceeds the constitutional requirements set forth in *Belle Terre, supra*, and *Moore, supra*. It is not the duty of this Court to grant extra-constitutional rights and privileges. Instead, the power to enact social legislation rests exclusively in the hands of the General Assembly or with local legislative bodies.

While the above-cited cases are distinguishable from this case, the Supreme Court of Ohio has handed down

a well-reasoned opinion. *Carroll v. Washington Twp. Zoning Com'n*, (1980) 63 Ohio St.2d 249, 17 Ohio Op.3d 161, 408 N.E.2d 191. The *Carroll* court held that a group home operated principally for the care of foster children did not qualify as a single-family dwelling even where the ordinance failed to define or restrict the term family. In reaching this conclusion, the court stated that:

> [t]he term 'family,' when used without definition in a residential use restriction, must be interpreted in light of permissible zoning objectives. A political subdivision may legitimately segregate land uses in order to, *inter alia*, provide adequate fire and police protection, decrease noise and noxious odors, control traffic flow, limit land use intensity, and create reasonably secure and stable residential neighborhoods. The attainment of '[a] quiet place where yards are wide, people few, and motor vehicles restricted . . .' is a reasonable goal of land use legislation. *Village of Belle Terre v. Boraas* (1974), 416 U.S. 1, 9, 94 S.Ct. 1536, 1541, 39 L.Ed.2d 797.
>
> * * * *
>
> "Local governments may, through the passage of zoning-type legislation, reasonably restrict the use of land into districts with the aim of promoting the public health, safety, morals and welfare. There is no constitutional prohibition in denying certain uses of one's property in a comprehensive plan for the development of communities for the common welfare of the community. *Euclid v. Ambler Realty Co., supra.* A comprehensive township zoning plan which excludes a use of this type is not *per se* unconstitutional.
>
> "The exercise of local discretion in areas of social and economic legislation will be approved where it is in accordance with law and, not in conflict with

> general law as enacted by the General Assembly; and where such local enactments are reasonable, not arbitrary, and bear a reasonable relationship to a permissible governmental objective."
>
> 408 N.E.2d at 193-194.

While the rationale set forth in *Carroll* is consistent with the decision reached in the case at bar, we reach our decision solely upon firmly established rules of statutory interpretation. The Villages' proposed group home does not constitute a single-family dwelling under the DDZO. Nor does such a group home, which operates for the principal purpose of caring for foster children qualify as an accessory use within the D-3 district.

The decision of the trial court is reversed.

Reversed.

NEAL, P.J., SITTING BY DESIGNATION, CONCURS; RATLIFF, J. SITTING BY DESIGNATION, DISSENTS WTH OPINION.

IN THE COURT OF APPEALS OF INDIANA
THIRD DISTRICT

No. 2-783 A 256

THE METROPOLITAN DEVELOPMENT
COMMISSION OF MARION COUNTY,
Plaintiff-Appellant,

vs.

THE VILLAGES, INC.,
Defendant-Appellee.

[Filed June 13, 1984]

APPEAL FROM THE MUNICIPAL COURT OF MARION COUNTY
ROOM NO. TWELVE
THE HONORABLE DAVID A. JESTER, JUDGE
(CAUSE NO. E1233-022)

RATLIFF, J., sitting by designation.

DISSENTING OPINION

I dissent. The contemplated use of the residence in question by The Villages as a group home for abused, abandoned, and neglected children in a simulated family environment constitutes a single-family dwelling within the restrictions of the zoning ordinance. Although the courts of Indiana have not had occasion to deal with this problem, that the proposed use meets the definition of single-family residence is clearly established by decisions from our sister states. *Hessling v. City of Broomfield,*

(1977) Colo., 563 P.2d 12; *Hamner v. Best*, (1983) Ky. App., 656 S.W.2d 253; *Group House of Port Washington v. Board of Zoning*, (1978) 45 N.Y.2d 266, 380 N.E.2d 207; *City of White Plains v. Ferraioli*, (1974) 34 N.Y.2d 300, 313 N.E.2d 756; *Saunders v. Clark County Zoning Department*, (1981) 66 Ohio St. 2d 259, 421 N.E.2d 152. In fact, it has been held that use of a residence for treatment of six or fewer mentally retarded children living with a resident foster parent was not violative of a restructive covenant restricting use to single-family residences. *Bellarmine Hills Association v. Residential Systems Co.*, (1978) 84 Mich. App. 554, 269 N.W.2d 673. In my view, an examination of these cases compels a decision opposite to that reached by the majority.

Hamner is nearly identical factually to this case. There, a non-profit entity desired to use a large older home as a child care facility to house one married couple and from six to eight children. The applicable zoning ordinance restricted use of property within the area to single-family dwellings. Like the ordinance in question, the ordinance in *Hamner* did not define either "family" or "single family". The children would not be either juvenile offenders or mentally retarded requiring institutional type regulation. They would attend community schools and no professional counselors would live in the home. The Kentucky Court of Appeals held the proposed use was for a family residence rather than as an institution, saying:

> "[T]he record contains substantial evidence that the residents of the home would function as, and resemble that of, any other single-family household. In fact, the evidence clearly indicates that the entire purpose of the group home is to provide a traditional home environment for the children; . . .
>
> . . . .
>
> Clearly, the term 'family', as determined by our highest court in the context of land use cases or

> zoning, may include unrelated individuals and has not been construed to refer only to those related by blood, marriage, or adoption."

656 S.W.2d at 255-56.

In *Hessling*, the Colorado court upheld the use of a residence as a live-in home for a married couple who would act as surrogate parents and not to exceed six mentally retarded children ranging in age from five to nine, as constituting a family thus meeting the zoning restriction limiting use to one family dwellings, so long as family characteristics were maintained.

Group House of Port Washington involved a non-profit corporation which had purchased a home for use as a group home which would consist of two surrogate parents and seven children. The home was intended as a replacement family for victims of unhappy homes and not as a detention center. The zoning ordinance restricted use to one-family residences and defined a family as one or more persons related by blood, marriage or legal adoption residing in a single housekeeping unit and allowed not more than two boarders all living in a common household. The New York Court of Appeals found no zoning violation and stated:

> "The surrogate family which petitioner hopes to create is in fact a permanent family structure, and not a temporary residence for transients . . . .
>
> Finally, we would emphasize that our decision today is limited to homes such as that described in this opinion, which serve as the functional equivalent of a family, for the exclusion of such groups would in no way further any valid public purpose. Whether a particular 'group home' comes within this description is essentially a factual question. Different factors would exist were petitioner to convert its group house, for example, from the type of operation described above into a home for delinquents or the men-

> tally disturbed, and we express no opinion as to the proper result in such a case. Thus, we conclude only that the 'group home' described in this opinion is a permitted use as a one-family dwelling under the town zoning ordinances. Should the nature of the house change with the passage of time, however, should it become less of a surrogate family and more of an institution, it might then become an unpermitted use. On this record, however, we must conclude that petitioner's 'group home' is indeed a family."

45 N.Y.2d at 273-74, 380 N.E.2d at 211.

The New York Court of Appeals in *Ferraioli*, stated the issue thus:

> "The issue is a narrow one: whether the 'group home', consisting of a married couple and their two children, together with 10 foster children, qualifies as a single 'family' unit, under the ordinance. It is concluded that the group home, set up in theory, size, appearance and structure to resemble a family unit, fits within the definitions of family for purposes of a zoning ordinance."

34 N.Y.2d at 300, 313 N.E.2d at 757.

In *Ferraioli*, a non-profit corporation licensed by the state to care for neglected and abandoned children had a group home consisting of the persons described in the court's statement of the issue. The couple was paid a salary and all expenses were paid by the corporation. "The children, natural and foster, live[d] together as if they were brothers and sisters and [the couple] were their common parents. The household [was] maintained as a family would be in a single housekeeping unit with kitchen facilities." 34 N.Y.2d at 304, 313 N.E.2d at 757. The zoning ordinance permitted single family dwellings for one housekeeping unit only. "Family" was defined as "one or more persons limited to the spouse, parents, grandparents, grandchildren, sons, daughters, brothers or

sisters of the owner or the tenant or of the owner's spouse or tenant's spouse living together as a single housekeeping unit with kitchen facilities." 34 N.Y.2d at 304, 313 N.E.2d at 758. The court held the use was within the zoning restriction. The court stated:

> "Whether a family be organized along ties of blood or formal adoptions, or be a similarly structured group sponsored by the State, as is the group home, should not be consequential in meeting the test of the zoning ordinance. So long as the group home bears the generic character of a family unit as a relatively permanent household, and is not a framework for transients or transient living, it conforms to the purpose of the ordinance . . . .
>
> In short, an ordinance may restrict a residential zone to occupancy by stable families occupying single-family homes, but neither by express provision nor construction may it limit the definition of family to exclude a household which in every but a biological sense is a single family. The minimal arrangement to meet the test of a zoning ordinance, as this one, is a group headed by a householder caring for a reasonable number of children as one would be likely to find in a biologically unitary family."

34 N.Y.2d at 305-06, 313 N.E.2d at 758-59.

A like result was reached in *Saunders*. There, a minister and his wife and five children lived at a large residence with as many as nine foster children. The home was later incorporated as a non-profit corporation. A few persons were employed to assist in caring for the children. The zoning was for single-family detached residences and the ordinance contained the following relevant definitions:

> "4.08: *Boarding or Lodging House.* A building or part thereof, other than a hotel or restaurant, where meals and/or lodging are provided, for compensation, for five (5) or more persons not transients.

4.171: *Dwelling, Single-Family.* A building designed for or used exclusively by one family or housekeeping units.

4.174: *Dwelling Unit.* One room, or a suite of two or more rooms, designed for or used by one family for living and sleeping purposes and having only one (1) kitchen or kitchenette.

4.18: *Family.* A person living alone, or two or more persons living together as a single housekeeping unit, in a dwelling unit, as distinguished from a group occupying a boarding house, lodging house, motel or hotel, fraternity or sorority house."

66 Ohio St. 2d at 262, 421 N.E.2d at 155. The zoning administrator issued a cease and desist order claiming the house was a boarding house. The Ohio Supreme Court found no violation of the ordinance. The court said:

"The definition of 'family' in this resolution is a broad one. In our view, any resolution seeking to define this term narrowly would unconstitutionally intrude upon an individual's right to choose the family living arrangement best suited to him and his loved ones. Those loved ones can just as easily be foster children as natural children for parents with compassion. A state or local government cannot constitutionally invade the private realm of family life. A family unit, which performs the social function of child-rearing, regardless of its relationship or composition or whether it includes foster children as well as natural children, is constitutionally protected against governmental intrusion not supported by a compelling governmental interest.

Therefore, . . . we hold a family based group foster home for delinquent boys, who are unrelated by affinity or consanguinity to the foster parents, is a permitted use in an 'R-1 suburban residence dis-

> trict' where the zoning resolution defines the term 'family' as 'two or more persons living together as a single family housekeeping unit, in a dwelling unit,' where it defines 'dwelling unit' as 'one room or a suite of two or more rooms, designed for or used by one family for living and sleeping purposes and having only one (1) kitchen or kitchenette,' and where it defines 'single-family dwelling' as '[a] building designed for or used exclusively by one family or housekeeping unit.'
>
> . . . .
>
> We now interpret the term 'family' broadly in order to permit appellees to operate a foster home in an 'R-1 suburban residence district.' Such a board definition of 'family' is mandated by the Clark County Zoning Resolution, fundamental principles of zoning law, and immutable constitutional principles guaranteeing the right of every American to live with his family free from official harassment. [Citations omitted; footnote omitted.]"

66 Ohio St. 2d at 263-65, 421 N.E.2d at 155-57.

The majority relies on an earlier Ohio case, *Carroll v. Washington Township Zoning Commission*, (1980) 63 Ohio St. 2d 249, 408 N.E.2d 191, a case which is not even mentioned in *Saunders*. In my view, *Carroll* is not a sound decision, and I agree with the dissenting opinion of Justice Brown that "[t]he majority's resolution of this case [Carroll] is supported neither by logic nor by case law from [that] jurisdiction or any other." 63 Ohio St. 2d at 253, 408 N.E.2d at 194.

The majority attempts to evade the holdings in *Saunders* and other cases cited herein by attempting to distinguish them "on the basis that the ordinances concerned broadly defined family to encompass unrelated individuals operating as a single-housekeeping unit." Slip opinion at 5. In fact, the ordinances in *Saunders, Fer-*

raioli, and *Group House of Port Washington* contained narrow definitions of family, but the courts, nevertheless, found the homes in question were not violative of the ordinance restricting use to single-family dwellings.

In my opinion, the group home proposed by The Villages meets the test of a single-family residence under the authorities herein cited. I would affirm the judgment.

APPENDIX B

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

THE MARION COUNTY MUNICIPAL COURT
CAUSE NO. E1233-022 ROOM NO. 12

THE METROPOLITAN DEVELOPMENT
COMMISSION OF MARION COUNTY,
Plaintiff,

v.

THE VILLAGES, INC.,
Defendant.

[Filed Apr. 18, 1983]

FINDINGS OF FACT, CONCLUSION OF LAW, OPINION AND JUDGMENT.

This cause of action having been heard on March 9, 1983, and the Court, having received and considered evidence from and on behalf of all parties, now enters its Findings of Fact, Conclusions of Law, Opinion and Judgment.

I. *Findings of Fact*

1. The Court has jurisdiction of the parties and subject matter of this cause of action.

2. The Metropolitan Development Commission of Marion County (hereinafter referred to as the "Commission") is the proper party to maintain this cause of action pursuant to Indiana Code 36-7-4-202(c) and 36-7-4-1014.

3. The Defendant, The Villages, Inc. (hereinafter referred to as the "Villages"), is the owner, and the intended occupier, user, and possessor of the real estate commonly referred to as 6135 North Meridian Street, a/d/a 6131 North Meridian Street, Indianapolis, Marion County, Indiana, and more particularly described as follows:

> Lots 538 and 539 in Warfleigh Addition, an addition to the City of Indiananpolis, as per plat thereof, recorded in Plat Book 15, pages 140-142 in the Office of the Recorder of Marion County, Indiana,

(hereinafter referred to as the "Real Estate"). Therefore, the Villages is a proper party in this action.

4. The Real Estate is zoned D-3.

5. The Dwelling Districts Zoning Ordinance of Marion County, Indiana, as amended (hereinafter referred to as the "DDZO") contains regulations and requirements pertaining to the primary uses, accessory uses, and development standards authorized in Dwelling Districts within Marion County, Indiana, including real estate which is zoned D-3.

6. The Complaint by the City against the Defendant, The Villages, Inc., arises as a result of The Villages purchase and intended use of a home located at 6135 North Meridian Street, Indianapolis.

7. The Villages is a not-for-profit corporation organized in the State of Kansas to help abused, abandoned and neglected children, including orphans, throughout the Midwest.

8. The Villages proposes to operate a foster care facility staffed by two houseparents, and a set of back-up houseparents, who will provide the care and shelter for up to ten (10) abused, abandoned, or neglected children, such children being wards of a court or a government agency that pays The Villages about thirty-six ($36.00) per day per child to provide such care and shelter.

9. This home is a one-family dwelling which was previously occupied and used by a married couple and their eleven (11) children. It has seven bedrooms and four and a half baths and is located on two residential lots.

10. The married couple to be employed by The Villages will reside in the house with their natural children, if any, as their sole residence and care for the foster children on an around-the-clock basis.

11. No sign will be displayed by the Villages on the real estate.

12. The Villages' purpose in establishing such a residence is to emulate a stable family environment for children who would otherwise not have one.

13. The house-parents and the foster children will keep and maintain the house as a single housekeeping unit, having one kitchen, eating together at family mealtimes, celebrating holidays together, and enjoying vacations together.

14. Foster children will attend local schools the same as other children in the neighborhood.

15. The foster children are referred to The Villages principally by the county welfare department, because their natural parents are not able to provide care for them.

16. The children referred to The Villages are in turn screened as to the child's willingness, ability and commitment to live in and contribute to a family environ-

ment and to remain in the home through high school graduation.

17. Use of the home will have every appearance of a one-family dwelling.

18. The Villages operates four other similar homes in the State of Indiana, and each is licensed as a group home as that term is defined under regulations administered by the Indiana Department of Public Welfare.

19. On November 19, 1982, a representative of The Villages met with City officials to discuss its planned operation.

20. The Indiana Director of The Villages, Robert Gillogly, was informed on November 19, 1982, by J. Nicholas Shelley, then Administrator of the Division of Planning and Zoning, Department of Metropolitan Development, that the Proposed Use could not be established on the Real Estate without a zoning variance or rezoning to a Special Use VII (SU-7) District.

21. The Special Use Districts Zoning Ordinance of Marion County, Indiana, lists a charitable and philantropic institution as a use permitted in a Special Use VII (SU-7) District.

22. Following such meeting, The Villages sought legal counsel respecting the question of whether it needed some special land use approval before occupying and using the residence.

23. On December 15, 1982, counsel for The Villages wrote the City setting forth authority and reasoning for the proposition that The Villages required no special land use approval.

24. On January 10, 1983, The Villages closed on its purchase of the residence at 6135 North Meridian and thereafter held fee simple title to the real estate.

25. On January 19, 1983, the City responded to the prior letter of December 15, 1982, stating that The Villages must rezone the property to a Special Use 7 zoning classification or obtain a variance.

26. Upon the advice of counsel and in good faith, The Villages determined not to seek rezoning or variance, but informed the City of its intention to occupy and use the home with a husband and wife caring for no more than ten foster children.

27. The Real Estate has been and is being prepared for the implementation of the Proposed Use on or shortly after April 1, 1983.

II. *Conclusions of Law*

1. The Court has jurisdiction over the parties and the subject matter of this controversy, pursuant to IC 33-6-1-3-2(3) and IC 36-7-4-1014(c).

2. The Law is with The Villages and against the Commission.

3. The subject real estate, 6135 North Meridian, Indianapolis, Indiana, is located in an area zoned D-3 under the Marion County Dwelling District Ordinance.

4. The D-3 Ordinance permits one-family dwelling units, and accessory uses, along with group homes and other uses not pertinent to this cause.

5. The use of the subject real estate by an organization which employs a married couple to work in said facility on an around the clock basis to provide care and shelter for abused, abandoned, or neglected children is a one-family dwelling use and therefore is a permitted primary use in a dwelling district zoned D-3 because such use fits within the plain and ordinary meaning of the term "family".

Furthermore, the providing of care to foster children is contemplated by the ordinance by virtue of the fact

that foster family care is expressly permitted under Section 2.15(10) of the Dwelling District Ordinance.

6. The home proposed by The Villages is not a group home under Sections 2.18 and 2.19(29) of the Dwelling District Ordinance, because the children are not developmentally disabled, as defined therein.

7. The proposed home also does not constitute use by a charitable or philantropic institution under the Special Use Ordinance, since the house will be utilized by persons living there as a family, as a single housekeeping unit and as their sole personal residence.

8. To the extent that any finding of act [*sic*] is a conclusion of law or any conclusion of law is a finding of fact, it shall be so deemed irrespective of the headings given above.

9. The trial of this action of the merits should be advanced and consolidated with the preliminary injunction hearing.

III. *Opinion*

The issues presented by this case are fairly simple: is the proposed use a permitted use under the terms of the existing Dwelling District Zoning Ordinance. The resolution of this question involves an interpretation of the term "family" as used in the ordinance. "Family" is not defined within the ordinance.

This is a question of first impression in the State of Indiana. Other states which have interpreted the term "family" as used by zoning ordinances, have gone both ways, by either permitting or denying a use such as proposed under what is basically the same fact situation, as will be discussed later.

Further confusion is added to the problem by the fact that the United States Supreme Court has upheld a very restrictive ordinance that defined the word "family" to

mean one or more persons related by blood, adoption, or marriage, or not more than two unrelated persons, living and cooking together as a single housekeeping unit. The court held the ordinance constitutional in that such a definition was not unreasonable or arbitrary and involved no deprivation of "fundamental" rights. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 39 L.E.2d 797 (1974). This very restrictive definition would seem to be at odds with the more liberal definition most jurisdictions have taken, even when denying the proposed use.

Unfortunately, our ordinance gives no definition of the term "family". Therefore the court is placed in the position of defining that term by its usual and ordinary meaning. *St. Germain v. State*, 267 Ind. 252, 369 N.E.2d 931 (1977); *Sutto v. Board of Medical Registration and Examination*, 242 Ind. 556, 180 N.E.2d 533 (1962) [.]

Therein lies the rub. As the Michigan Court in *Bellarmine Hills Association v. Residential Systems Co.*, 84 Mich. App. 554, 269 N.W.2d 673, 675 (1978), pointed out:

> " 'Now this word 'family,' contained in the statute, is an expression of great flexibility. It is applied in many ways. It may mean the husband and wife having no children and living alone together, or it may mean children, or wife and children, or blood relatives, or any group constituting a distinct domestics or social body. It is often used to denote a small select corps attached to an army chief, and has even been extended to whole sects, as in the case of the Shakers.'
>
> Our examination of subsequent cases and authority from other jurisdictions discloses no more specific definition of the term. Rather, the word family denotes a concept, the application of which is dependent upon the basis of affiliation of the group being analyzed juxtaposed with the public policies invoked

> by the particular circumstances of the case being reviewed."

In looking to the decisions of other states, as previously stated, the court finds very little direction. Under what are, for all practical purposes, identical facts, the courts have reached opposite conclusions. For example, in *Saunders v. Clark City Zoning Dept.*, 66 Ohio St. 22d 259, 421 N.E.2d 152 (1981), under facts very similar to the case before the court, (with the exception that in that case the children were *delinquent* boys) the court permitted the use.

On the other hand, in *Carroll v. Washington Township Zoning Commission*, 63 Ohio St. 2d 249, 408 N.E.2d 191 (1980), the court reached an opposite conclusion, in a case involving foster children, under an ordinance which defined "family" less restrictively than in the *Saunders* case. Interestingly enough, the *Carroll* case was not even mentioned in the *Saunders* case.

It is, therefore, necessary to analyze the reasoning of these cases and attempt to adopt the better rule. In that regard the cases are very instructive, because both sides of the issue have been thoroughly rationalized.

We start with the basic premise that the term "family" should be interpreted in a broad way. As stated by the court in *Saunders*:

> "In our view, any resolution seeking to define this term narrowly would unconstitutionally intrude upon an individual's right to choose the family living arrangement best suited to him and his loved ones. *Moore v. East Cleveland* (1977[)], 431 U.S. 494, 499, 97 S.Ct. 1932, 1935, 52 L.Ed.2d 531."

Clearly, however, the pursuit of the goal of a ". . . quiet place where yards are wide, people few, and motor vehicles restricted . . ." is a legitimate interest of land use regulation. *Village of Belle Terre v. Boraas*, 416 U.S.

1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974). And the term "family" must be defined within that context.

It is the conflict between these competing interests which makes the definition difficult. To severely restrict the definition of a family would tend to insure the tranquility of the neighborhood. But to do so would extend the function of zoning regulation beyond its legitimate parameters. We prefer the more permissive view as taken in the *Saunders* case.

The basis of affiliation of the neighborhood is the pursuit of the interests of ". . . a quiet place where yards are wide, people few, and motor vehicles restricted . . .", as delineated in the *Belle Terre* case. The basis of affiliation of the foster children proposed to be housed by the use requested by the respondents in [sic] the same. It is those characteristics that attract them there. The needs and desires of both groups are the same—a quiet peaceful neighborhood.

A proper definition of family we believe permits sufficient limitation to protect the single family residential neighborhood, while restricting zoning regulations to their legitimate interests.

The cases most directly on point, and the ones with which the courts reasoning most closely coincides are *City of White Plains v. Ferraioli*, 34 N.Y.2d 300, 313 N.E.2d 756 (1974) and *Group House of Port Washington v. Board of Zoning*, 45 N.Y.2d 266, 380 N.E.2d 207 (1978). The facts are very similar: the houses were owned by a not-for-profit corporation, occupied by an adult couple which was paid by the corporation to rear either seven (7) or ten (10) foster children. The household was maintained as a family would be in a single housekeeping unit with kitchen facilities. Funding was supplied primarily by governmental sources.

As pointed out by the court in the *White Plains* case:

> "It is significant that the group home is structured as a single housekeeping unit and is, to all outward appearances, a relatively normal, stable, and permanent family unit . . . If that be true, the group home is no less qualified to occupy the Ferraioli house than are any of the neighboring families in their respective homes."
>
> ". . ."
>
> "The group homes does not conflict with the character and, indeed, is deliberately designed to conform with it."
>
> " . . ."
>
> "Indeed, the purpose of the group homes is to be quite the contrary of an institution and to be a home like other homes."

All of these characteristics are present in the instant case. It is, in fact, the purpose of the proposed use to place foster children in as near a normal family environment as possible so that they may become integrated into the community and their "family" more so than if institutionalized.

It seems axiomatic that this goal is favored by public policy. The opportunity to live in a stable neighborhood, with the attendant benefits of going to school there, developing friendships among one's neighbors and schoolmates, and developing the community ties permitted by such a manner of living, is highly desirable and must be favored by the law.

Where certain children are deprived of this opportunity, for whatever reason they have been taken from their natural family, it seems incumbent upon society to attempt to ameliorate the detrimental effects by placing them in as natural a situation as possible. Public policy would seem to demand that where this can be accomplished, in a reasonable manner, that it be done.

Our laws in every instance that comes to mind, places the best interest of the child above most all other considerations. It is not unreasonable to conclude, therefore, that this interest dictates that public policy favors placing them in stable neighborhoods where reasonably done.

The court can find no conflict between public policy, the needs and desires of the neighbors to the requested use, the children to be resident there, and the laws interest in protecting neighborhoods as pointed out in the Villages of *Belle Terre* case. Indeed, a definition of "family" which permits the proposed use is compatible with the concept of a residential neighborhood. As stated by the court in the *Group House of Port Washington* case; ". . . petitioners group home' might actually support and further those values even more effectively than certain natural families." There is nothing in the record to indicate otherwise.

It is important in this respect to note that these are neither disturbed, mentally retarded, nor delinquent children. This is merely a home for children, who, because of an unhappy home life, simply cannot thrive and grow if they live with their natural parents. There is no reason to believe that these children will be any better or worse that [sic] the children of the family that previously lived in the house (which actually had a larger number of children.)

Were the children delinquent, or physically or mentally disadvantaged, this case might be more difficult to decide. In that instance the intrusion upon the neighborhood would be more intense, and depending upon the facts of the case, might lead to a different result. In this instance, however, a reasonable definition of "family" easily includes children of the type proposed to be housed in this residential neighborhood.

That is not to say that the concerns of the surrounding neighbors are not real. Obviously, ten (10) children

added to the neighborhood will have an effect. But no more than the effect of ten (10) children living with their natural parents, which is clearly permitted.

We believe the law of this state is that the purpose of zoning regulation is "to control types of housing and living and not the genetic or intimate internal family relations of human beings." *City of White Plains, supra,* at 758.

Likewise, we believe that the law of this state is as summarized by Justice Brown in his dissent in the *Carroll* case, *supra,* as follows:

> "In the instant cause I would use a definition similar to that set out by Justice Tobriner in *Brady v. Superior Court* (1962) 200 Cal.App.2d 69, 77, 19 Cal.Rptr. 242, 247, where he stated:
>
> 'Single family dwelling' designates the joint occupancy and use of the dwelling by all of those who live there. The word 'single' precludes the segregation of certain portions or rooms for rental. It forecloses multiple occupancy of certain portions of the unit for rental as a segregated part, or parts, of the unit. 'Dwelling' means the whole of the premises used for living purposes. It must include the use of the common rooms, such as the kitchen, dining room, living room, if any, by all occupants. It refers to, and reinforces, the concept of singular use, as opposed to multiple. The "dwelling' cannot be fragmentized into broken bits of housing for rental return. 'Family' signifies living as a family; it inhibits the breaking up of the premises into segregated units.' "
>
> ". . ."
>
> "In a recent New Jersey Supreme Court case an extensive survey of the courts was made and it was stated that:

" 'The courts of this and other states have often noted that the core concept underlying single family living is not biological or legal relationship, but, rather, its character as a single house-keeping unit. *Berger v. State, supra,* 71 N.J. at 227, 364 A.2d 993. see *Kirsch Holding Co. v. Borough of Manasquan, supra,* 49 N.J. at 250, 281, A.2d 513; *City of Des Plaines v. Trottner, supra*; *Boston-Edison Protective Ass'n v. Paulist Fathers,* 306 Mich. 253, 10 N.W.2d 847 (Sup.Ct.1943); *City of White Plains v. Ferraioli,* 34 N.Y.2d, 300, 305-307, 357 N.Y.S. 2d 449, 452-454, 313 N.E.2d 756, 758-759 (Ct.App.1974). As long as a group bears the 'generic character of a family unit as a relatively permanent household,' it should be equally as entitled to occupy a single family dwelling as its biologically related neighbors. *City of White Plains, supra,* 34 N.Y.2d at 306, 357, N.Y.S.2d at 453, 313, N.E.2d at 758; see, e.g. *Brady v. Superior Ct.* 200 Cal.App. 2d 69, 19 Cal.Rptr. 242 (Dist.Ct.App.1962); *Oliver v. Zoning Comm'n of Chester* 31 Conn. Sup. 197, 326 A.2d 841 (C.P. Middlesex Cty. 1974); *Carroll v. City of Miami Beach,* 198 So. 2d 643 (Fla.Dist.Ct. App. 1967); *Group House of Port Washington, Inc. v. Board of Zoning,* 45 N.Y.2d 266, 408 N.Y.S.2d 377, 380 N.E.2d 207 (At.App.1978); *Little Neck Comm. Ass'n. v. Working Org. for Retarded Children,* 52 A.D. 2d 90, 383 N.Y.S.2d 364 (App.Div. 1976); *Missionaries of Our Lady of LaSalette v. Village of Whitefish Bay* 267 Wis. 609, 66 N.W.2d 627 (Sup. Ct. 1954)." *State v. Baker* (1979), 81 N.J.99, 405 A.2d 368, at page 372. See, also, *Hessling v. Broomfield* (1977), 193 Colo. 124, 563 P.2d 12.' "

We would add the following thoughts of Justice Clifford Brown in the majority opinion in the *Saunders* case, *supra*:

"Those loved ones can just as easily be foster children as natural children for parents with compassion. A state or local government cannot constitutionally invade the private realm of family life. *Wisconsin v. Yoder* (1972) 406 U.S. 205, 231-233, 92 S.Ct. 1526, 1541-1542, 32 L.Ed.2d 15; *Prince v. Massachusetts* (1944), 321 U.S. 158, 166 64 S.Ct. 438, 442, 88 L.Ed. 645; *Village of Belle Terre v. Boraas* (1974) 416 U.S. 1, 94 S. Ct. 1536, 39 L.Ed. 2d 797, dissenting opinion of Marshall, J., at page 16, 94 S.Ct. at 1544. A family unit, which performs the social function of child-rearing, regardless of its relationship or composition or whether it includes foster children as well as natural children, is constitutionally protected against governmental intrusion not supported by a compelling governmental interest. *Smith v. Organization of Foster Families* (1977), 431 U.S. 816, 844-845, 97 S. Ct. 2094, 2109, 53 L.Ed. 2d 14; *Wisconsin v. Yoder, supra*; *Meyer v. Nebraska* (1923), 262 U.S. 390, 399-401, 43 S. Ct. 625, 626-627, 67 L.Ed. 1042; 91 *Harvard L. Rev.* 1427, 1571-1574.

We can find no compelling governmental reason in defining "family" so as to not permit the use of the structure in question in the manner proposed.

The concept of "family" in zoning regulations must be broad enough to permit the integration of children deprived of their parents into our neighborhoods. Granted, there must logically be some limitation; but where, as here, the primary use of the structure retains its character as a single housekeeping unit, it should be permitted to come within the definition of a single-family dwelling.

The annoyances, or detriments, which are inflicted upon the neighborhood by including within the definition of "family" a use such as proposed here, are minor compared to the benefits the neighborhood will bestow upon

these children. The very neighbors who are here concerned ("opposed" is too strong a word) will contribute immeasurably to the welfare of these children. The experiences one collects within a neighborhood contribute in an intangible but very real way to ones growing up. It is these very things that cause us to protect our neighborhoods. Any zoning regulation must be sufficiently tolerant to permit those things to persons other than just those who are blessed by living with their natural parents.

In conclusion, however, it should be established that were the character of the use to change or expand beyond that which is proposed, then it might become an unpermitted use. Should it become less of a surrogate family and more of an institution, then an entirely different result could be expected. In that regard, therefore, the court expressly limits its decision to the particular facts found, as delineated in the courts findings, items 7 through 17.

Subject to this restriction, the court finds that proposed use is within the terms of the D-3 Dwelling District Ordinance, and Petitioner's request for an injunction should be denied.

IV. *Judgment*

It is therefore ORDERED, ADJUDGED AND DECREED as follows:

1. The Plaintiff, having failed to prove its right to any relief requested in this cause, the request for Preliminary and Permanent Injunctive relief is hereby denied.

2. The trial of this action on the merits is hereby advanced and consolidated with the Preliminary Injunction hearing, and this Judgment constitutes the Final Judgment of the Court pursuant to Trial Rule 65(A)(2).

3. Costs of this action are assessed against the Plaintiff.

/s/ David A. Jester
DAVID A. JESTER
Judge
Municipal Court of
Marion County
Room No. 12

Dated: April 18, 1983

Copies to:

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APPENDIX C

[SEAL]

STATE OF INDIANA
INDIANAPOLIS, 46204

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

Marjorie H. O'Laughlin, Clerk
217 State House

Telephone 232-1930

No. 2-783 A 256

THE METROPOLITAN DEVELOPMENT
COMMISSION OF MARION COUNTY

vs.

THE VILLAGES, INC.

You are hereby notified that the Court of Appeals has on this day DENIED PETITION FOR REHEARING. BUCHANAN, C.J.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 17 day of July, 1984

/s/ Marjorie H. O'Laughlin
Clerk Supreme Court and
Court of Appeals

[SEAL]

APPENDIX D

[SEAL]

STATE OF INDIANA
INDIANAPOLIS, 46204

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

Marjorie H. O'Laughlin, Clerk
217 State House

Telephone 232-1930

No. 2-783 A 256

THE METROPOLITAN DEVELOPMENT
COMMISSION OF MARION COUNTY

vs.

THE VILLAGES, INC.

You are hereby notified that the Supreme Court has on this day DENIED appellees petition for transfer. GIVAN, C.J.

GIVAN, C.J., DEBRULER AND PIVARNIK, JJ., VOTE TO DENY TRANSFER. PRENTICE AND HUNTER, J.J., VOTE TO GRANT TRANSFER AND AFFIRM THE TRIAL COURT.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 15 day of November, 1984

[SEAL]

/s/ Marjorie H. O'Laughlin
Clerk Supreme Court and
Court of Appeals

APPENDIX E

[3507]

APPENDIX D
Part 4

PART 4. DWELLING DISTRICTS ZONING ORDINANCE*

Chapter I. Establishment of Dwelling Zoning Districts, § 1.00, [1.01]

Chapter II. Dwelling Districts Regulations, §§ 2.00-2.19

Whereas, Chapter 283 of the Acts of the Indiana General Assembly for 1955, as amended, establishes a single planning and zoning authority in counties having first-class cities, and grants certain powers relative to the zoning and districting of land to the metropolitan plan commission and the county council of such counties having first-class cities, in order to unify the planning and zoning functions thereof; and

Whereas, no uniform regulations for the zoning and districting of land within the various political units within and a part of Marion County, Indiana, had heretofore existed, although the conditions relating to the use and development of said land are in many cases identical; and

---

* Editor's note—This part is derived from Metropolitan Plan Commission Docket No. 66-AO-2, as adopted July 18, 1966, as contained in a booklet promulgated by the department of metropolitan development, division of planning and zoning in December, 1971. The ordinance is set out as promulgated in the booklet with amendments through 69-AO-5. Amendments subsequent to 69-AO-5 have been worked in by the editor, and a parenthetical reference to the amendatory ordinance appears at the end of the amended section. Where the editor has added clarifying words and phrases, such words and phrases appear in brackets.

Whereas, the Metropolitan Plan Commission of Marion County, Indiana, has adopted and certified, pursuant to Chapter 283 of the Acts of the Indiana General Assembly for 1955, as amended, various segments of its *Original Comprehensive or Master Plan of Marion County, Indiana*, including a Land Use Map of Marion County, Indiana, adopted by Resolution 62-CPS-R-2 on August 8, 1962, and a Comprehensive General Land Use Plan for Marion County, Indiana, adopted by Resolution 65-CPS-R-1 on May 12, 1965; and

[3508]

Whereas, said Chapter 283 of the Acts of the Indiana General Assembly for 1955, as amended, empowers the Metropolitan Plan Commission of Marion County, Indiana, after such comprehensive plan certification, to recommend to the county council an ordinance or ordinances for the zoning or districting of all lands within the county to the end that adequate light, air, convenience of access, and safety from fire, flood and other danger may be secured; that congestion in the public streets may be lessened or avoided; that property values may be preserved; that the public health, safety, comfort, morals, convenience and general welfare may be promoted;

Now therefore be it ordained by the Marion County Council of Marion County, Indiana, that Marion County Council Ordinance No. 8-1957, adopted by the Marion County Council on March 28, 1957, and subsequently amended pursuant to Section 85 of Chapter 283 of the Acts of the Indiana General Assembly for 1955, as amended, and all zoning ordinances adopted as parts thereof, be amended pursuant to said Chapter 283, by the addition of the following provisions and the repeal of all portions thereof in conflict herewith:

CHAPTER I. ESTABLISHMENT OF DWELLING ZONING DISTRICTS

Sec. 1.00. [Districts established.]

The following primary Dwelling Zoning Districts for Marion County, Indiana, are hereby established, and land within said county, including the incorporated and unincorporated portions thereof, is hereby classified, divided and zoned into said districts as designated on the Dwelling Zoning Maps, which maps are attached hereto, incorporated herein by reference and made a part of this ordinance:*

[3509]

Symbols	*Dwelling Zoning Districts*
D-S	Dwelling Suburban District
D-1	Dwelling District One
D-2	Dwelling District Two
D-3	Dwelling District Three
D-4	Dwelling District Four
D-5	Dwelling District Five
D-6	Dwelling District Six
D-6 II	Dwelling District Six II
D-7	Dwelling District Seven
D-8	Dwelling District Eight
D-9	Dwelling District Nine
D-10	Dwelling District Ten
D-11	Dwelling District Eleven
D-12	Dwelling District Twelve
D-P	Planned Unit Development District

* * * *

* Editor's note—The maps referred to in this section are not set out in this appendix, but are on file in the office of the department of metropolitan development.

[3518]

Sec. 2.04. D-3 Dwelling District Three regulations.

A. *Permitted D-3 uses.* The following uses shall be permitted in the D-3 District. All uses in the D-3 District shall conform to the D-3 development standards (section 2.04, B) and the Dwelling District regulations of section 2.00:

1. One-family dwelling, including manufactured homes as regulated in section 2.175;

[3519]

2. Two-family dwelling (permitted on corner lots only);
3. Group homes, as regulated in section 2.18;
4. Temporary uses, as regulated in section 2.14;
5. Accessory uses, as regulated in section 2.15;
6. Home occupations, as regulated in section 2.16.

B. *D-3 development standards.*

1. *Minimum lot area:*

a. Minimum lot area:

One-family dwelling: Ten thousand (10,000) square feet;

Two-family dwelling: Fifteen thousand (15,000) square feet;

provided, however, any plat of a subdivision consisting of five (5) lots or more submitted for plat approval in accordance with the Subdivision Control Ordinance of Marion County, Indiana, subsequent to the effective date of this ordinance [adopted July 18, 1966, to become effective as provided by law], may reduce said minimum lot area of twenty (20) percent of the total number of lots within

said plat, to the extent of twenty (20) percent below such ten thousand (10,000) square foot requirement, provided the average size of all lots within said approved plat shall then be at least ten thousand (10,000) square feet.

b. An additional five thousand (5,000) square feet of lot area shall be required for any lot utilizing a septic tank or other individual sewage disposal system.

2. *Minimum lot width and street frontage:* Minimum lot width at the setback line:

One-family dwelling: Seventy (70) feet;

Two-family dwelling: One hundred and five (105) feet (on each street);

[3520]

provided, however, any plat of a subdivision consisting of five (5) lots or more submitted for plat approval in accordance with the Subdivision Control Ordinance of Marion County, Indiana, subsequent to the effective date of this ordinance [adopted July 18, 1966, to become effective as provided by law], may reduce said minimum width of twenty (20) percent of the total number of lots within said plat, to the extent of ten (10) percent below such seventy (70) and one hundred and five (105) foot requirements.

Each lot shall have at least thirty-five (35) feet of frontage on a public street, and shall gain access from said street.

3. *Setback lines and minimum yards:*

a. Setback line and minimum front yard: Yards, having a minimum depth in accordance with the setback requirements of section 2.17, A,

shall be provided along all public street right-of-way lines.

b. Minimum rear yard: Twenty (20) feet.

c. Minimum side yards: Aggregate—Sixteen (16) feet. Provided, however, no side yard shall be less than six (6) feet.

4. *Minimum open space:* Open space (as defined in section 2.19) shall comprise at least seventy (70) percent of the lot area.

5. *Maximum height:*

a. Primary building: Thirty-five (35) feet.

b. Accessory building: Twenty (20) feet.

6. *Minimum floor area:* Minimum main floor area of the primary building, exclusive of garages, carports and open porches:

One-story building: Nine hundred (900) square feet for each dwelling unit;

Building higher than one story: Six hundred sixty (660) square feet for each dwelling unit in the building.

[3521]

7. *Off-street parking and public streets:* Off-street parking areas and public streets shall be provided in accordance with section 2.17, E and C [respectively].

(G.O. 41, 1981, § 1; G.O. 54, 1982, § 1)

* * * *

[3560]

Sec. 215. Accessory uses.

A. *Permitted Accessory Uses.* The following accessory uses shall be permitted in all Dwelling Districts, except the D-11 Dwelling District, subject to the accessory use

requirements of section 2.15, B, and the Dwelling District regulations of section 2.00:

1. Accessory garages, carports, canopies, patios, outdoor fireplaces, porte cocheres, bathhouses, cabanas, children's playhouses, swings and other play structures or equipment, greenhouses and other accessory buildings or structures;

2. Off-street motor vehicle parking areas, as regulated in section 2.17, E;

3. Signs, as regulated in section 2.18;

4. Private swimming pools, as regulated in section 2.15, B, 3;

5. Amateur radio sending and receiving antennas, provided the height thereof (including masts) shall not exceed seventy-five (75) feet measured from finished lot grade;

6. Management office in multiple-family districts and other facilities normally associated with tenants' convenience, such as vending machines and washing machines, provided, however, there is no exterior display;

7. Fallout shelters (either contained in other permitted structures or constructed separately), as regulated in section 2.15, B, 4;

8. Residential occupancy of no more than two (2) nontransient guests; provided that at least one (1) off-street parking space shall be provided for each guest bedroom, that no sign shall be displayed and no separate culinary facilities are maintained in connection with such accessory use;

[3561]

9. Residential occupancy by domestic employees employed on the premises;

10. Foster family care where children unrelated to the residents by blood or adoption are cared for, provided that no sign shall be displayed;

11. Day care of preschool children unrelated to the residents by blood or adoption when no more than five (5) such children are cared for; provided, that at least one additional off-street parking space shall be provided, and that no sign shall be displayed.

B. *Accessory Use Requirements.* Accessory uses in all Dwelling Districts shall comply with the following requirements:

1. *General accessory use requirements:* Accessory uses:

   a. Shall be customarily incidental accessory and subordinate to, and commonly associated with, the operation of the primary use of the lot;

   b. Shall be operated and maintained under the same ownership and on the same lot as the primary use;

   c. Shall be subordinate in area, extent and purpose to the primary use of building served;

   d. Unless otherwise specified in this ordinance, accessory buildings:

      (1) Shall not be located closer to any front or side lot line than the required minimum front and side yard distances of the Dwelling District; and

      (2) In D-S, D-1, D-2, D-3, D-4, D-5 and D-8 Dwelling Districts shall not be located closer to any rear lot line than five (5) feet, but in no case shall it encroach upon any easement;

e. Shall not be permitted prior to the erection of the primary building.

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2. *Appurtenances:*

a. Such appurtenant features as walks, driveways, curbs, drainage installations, mailboxes, lampposts, birdbaths and structures of like nature shall be permitted on any lot.

b. The growth of vegetables, grasses, fruits, flowers, shrubs, vines and trees, provided such operations are not for profit, shall be permitted on any lot.

c. Fences and walls shall be permitted provided they do not impede the view of street and/or railroad intersections.

3. *Additional requirements for accessory private swimming pools:* The following additional requirements shall apply to accessory private swimming pools:

a. A swimming pool shall not be located closer to any front, side or rear lot line than the required minimum front, side and rear yard distances of the Dwelling District.

b. The pool area shall be enclosed by a substantial protective barrier, which shall be adequate to prevent persons, children or animals from danger or harm, and shall be equipped with a self-closing, self-latching back gate. Such protective barrier shall be chain link or ornamental fence, solid fence or wall, and shall be not less than five (5) feet in height.

c. A buffer screen shall be provided and maintained between the pool and the lot lines.

d. No pool shall be erected or constructed until an improvement location permit has been obtained therefor.

4. *Additional requirements for accessory fallout shelters:* The following additional requirements shall apply to accessory fallout shelters:

a. A fallout shelter shall not be located closer to any front, side or rear lot line than the required

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minimum front, side and rear yard distances of the Dwelling District. Except, however, subject to the following requirements, any underground shelter, or portion thereof, may be located within said minimum required yards, but not closer than three (3) feet to any lot line:

(1) Such shelter or portion thereof shall be totally below ground level, with no appurtenances, air circulation equipment, vent pipes or other accessory equipment, or part thereof, projecting above ground level within said minimum required yards.

(2) No shelter entrance shall be located within said minimum required yards.

b. No fallout shelter shall be erected or constructed until an improvement location permit has been obtained therefor. (G.O. 157, 1975, § 1)

* * * *

[3575]

Sec. 219. Definitions.

1. *Advertising sign:* A sign which directs attention to any business, product, activity or service; provided, however, that such sign shall not be related or make reference to the primary use, business, activity or service conducted on the premises.

2. *Attached multifamily:* A structure for multifamily use, having common or party wall or walls.

3. *Building area:* The total ground area, within the lot or project, covered by enclosed residential building space plus garages, carports and other accessory buildings.

4. *Business sign:* A sign which identifies a builder or directs attention to a business, product, activity or service manufactured, sold or offered upon the premises as the primary use(s) where such sign is located.

5. *Car area:* Open space area (uncovered and covered) use for car traffic, maneuvering and parking. Included are all parking areas, driveways, interior access roads and right-of-way of all streets within the project, plus the area of half of any abutting alley or street right-of-way.

6. *Covered open space:* All exterior space within the project, which is open on its sides, but not open above to the sky. It includes roofed porches, roofed carports, covered exterior balconies and exterior spaces covered by portions of buildings.

7. *Detached single-family cluster dwelling:* A structure for single-family use, having no common or party walls; and utilizing common open space with other detached
[3576]
single-family cluster dwellings arranged in close proximity to one another.

8. *Facing:* The surface of the sign upon, against or through which the message of the sign is exhibited.

9. *Floor area:* The sum of the horizontal areas of the one or several floors and basements of all buildings or portions thereof, within the project, and devoted to permitted uses. Not including, however:

a. Floor or basement floor area devoted to off-street parking or loading facilities, including aisles, ramps and maneuvering space;

b. Floor or basement floor area provided for recreational uses, available to occupants of two (2) or more living units within the project; or

c. Basement floor area provided for storage facilities, allocated to serve individual living units within the project.

10. *Floor area ratio (FAR):* The total floor area of all stories of all buildings within the project divided by the land area.

[The next page is 3581]

11. *Incidental sign:* A nameplate or sign relating to the lot or use thereof and designating accessory uses, direction, identification, information or real estate for sale, rent or lease.

12. *Land area:* The total area within the project boundaries, plus the area of half of any abutting alley or street right-of-way plus half the area of any abutting open space, such as a river, lake, public park, playground or golf course, with reasonable expectance of perpetuity; provided, however, that no portion of such open space located more than eighty (80) feet from the project boundaries shall be included in computing such open space area.

13. *Livability space:* The open space minus the car area within the open space.

14. *Livability space ratio (LSR):* The livability space divided by the floor area.

15. *Major livability space:* The total area provided for outdoor recreation, relaxation, amusement, pleasure and for similar use within the project, which area may or may not be improved; however, all livability space countable for purposes of the major livability space ratio shall be at least twenty (20) feet away from any residential wall containing one or more windows on the ground floor

and shall have a minimum dimension averaging eighty (80) feet, except that an area of lesser dimension is countable if:

a. The total required major livability space is less than six thousand four hundred (6,400) square feet; or

b. The shape or topography of the site prevents compliance with the minimum dimension.

16. *Major livability space ratio (MLSR):* The total major livability space of countable size, divided by the total floor area.

17. *Open space:* The total horizontal area of all uncovered open space plus one-half of the total horizontal area of all covered open space.

18. *Open space ratio (OSR):* The open space divided by the floor area.

[3582]

19. *Parking space:* A portion of the car area at least nine (9) feet in width and twenty (20) feet in length, which shall be used only for the off-street parking of a vehicle.

20. *Project:* A lot or parcel of contiguous land to be developed for a use or uses permitted in the D-6, D-6 II, D-7, D-8, D-9, D-10 and D-11 Dwelling Districts, which at the time of development is under one (1) ownership or control, and subsequently may be subdivided, developed and/or conveyed into smaller lots or parcels. For permitted multifamily dwelling, detached single-family cluster dwelling uses, or mobile home dwellings, such smaller lots or parcels within the project may front upon private interior access roads provided said project meets the minimum street frontage requirements of sections 2.07, B, 2; 2.075, B, 2; 2.08, B, 2; 2.09, B, 2; 2.10, B, 2; 2.11, B, 2; 2.12, B, 2; and 2.13, B, 2 of this ordinance.

21. *Projecting sign:* A sign suspended from or supported by a building, structure or column and projecting out therefrom more than eighteen (18) inches.

22. *Sign:* Any outdoor announcement, declaration, device, demonstration or insignia used for direction, information, identification or to advertise or promote any business, produce, activity, services or interests.

23. *Sign structure:* The supports, uprights, bracing and framework for the sign. In the case of a sign structure consisting of two (2) or more sides, where the angle formed between any of the sides (or the projection thereof) exceeds fifteen (15) degrees, each side shall be considered a separate sign structure.

24. *Sign surface:* The entire area within a single, continuous perimeter enclosing all elements of the sign which form an integral part of the display.

25. *Total car ratio (TCR):* The total number of parking spaces divided by the number of living units.

26. *Uncovered open space:*

In D-6, D-6 II, D-7, D-8, D-9, D-10 and D-11 Districts, and D-12 District detached single-family cluster dwel-

[3583]

lings: The land area, minus the building area, plus the usable roof area.

In D-S, D-1, D-2, D-3, D-4 and D-5 Districts; and D-8 and D-12 District two-family dwellings; and D-8 single-family dwellings: The lot area, minus the building area.

27. *Usable roof area:* The total roof area, within the project, or residential buildings, garages and accessory buildings which has been improved for outdoor uses of occupants. Roof areas used for car storage are included.

28. *Building lot:* The lot or lots of contiguous ownership upon which the dwelling(s) is (are) located.

29. *Group home:* A residential facility licensed by the development disabilities residential facilities council, or its successor in authority in accordance with law, and defined per Indiana Code Section 16-10-12.1.

30. *One-family dwelling:* A unit designed for occupancy by one family, constructed or erected on a permanent foundation as specified by the Indiana One- and Two-Family Dwelling Code or by Chapter 8, Article III, Division 4 of the Code of Indianapolis and Marion County, which is either:

1. Constructed in compliance with the standards of the Indiana One- and Two-Family Dwelling Code; or
2. A manufactured home.

31. *Mobile dwelling:* A unit built in a factory designed for occupancy by one family erected or located as specified by Chapter 8, Article III, Division 4 of the Code of Indianapolis and Marion County, which was either:

1. Constructed prior to June 15, 1976, and bears a seal attached under Indiana Public Law 135, 1971, certifying that it was built in compliance with the standards established by the Indiana Administrative Building Council; or,
2. Constructed subsequent to June 15, 1976, and bears a seal certifying that it was built in compliance with the federal Mobile Home Construction and Safety Standards Law.

[3584]

32. *Manufactured home:* A unit built in a factory after January 1, 1981, bearing a seal certifying that it was built in compliance with the federal Manufactured Housing Construction and Safety Standards Law, which has at least nine hundred fifty (950) square feet of main floor area (exclusive of garages, carports and open porches), and exceeds twenty-three (23) feet in width. (G.O. 41, 1981, § 1; G.O. 54, 1982, § 1)

* * * *

APPENDIX F (1)

[TRIAL BRIEF]

* * * *

The Supreme Court of Ohio more recently found any zoning restriction based upon the content of a "family" to be constitutionally flawed. The Court, in a case involving a couple, their five children and as many as nine foster children, reasoned as follows:

> "The definition of 'family' in this resolution [zoning ordinance] is a broad one. In our view, any resolution seeking to define this term narrowly would unconstitutionally intrude upon an individual's right to choose the family living arrangement best suited to him and his loved ones. *Moore v. East Cleveland* (1977), 431 U.S. 494, 499, 97 S.Ct. 1932, 1935, 52 L.Ed.2d 531. Those loved ones can just as easily be foster children as natural children for parents with compassion. A state or local government cannot constitutionally invade the private realm of family life. *Wisconsin v. Yoder* (1972), 406 U.S. 205, 231-233, 92 S.Ct. 1526, 1541-1542, 32 L.Ed.2d 15; *Prince v. Massachusetts* (1944), 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645, *Village of Belle Terre v. Boraas* (1974), 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797, dissenting opinion of Marshall, J., at page 16, 94 S.Ct. at 1544. [Footnote omitted.] A family unit, which performs the social function of child-rearing, regardless of its relationship or composition or whether it includes foster children as well as natural children, is constitutionally protected against governmental intrusion not supported by a compelling governmental interest. *Smith v. Organization of Foster Families* (1977), 431 U.S. 816, 844-845, 97 S.Ct. 2094, 2109, 53 L.Ed.2d 14; *Wisconsin v. Yoder, supra*; *Meyer v. Nebraska* (1923), 262 U.S. 390, 399-401, 43 S.Ct. 625, 626-627, 67 L.Ed. 1042; 91

> Harvard L.Rev. 1427, 1571-1574." *Saunders v. Clark County Zoning Dept.*, 421 N.E.2d 152, 155-156 (Ohio 1981).

The Court emphasizes, quite properly, that choices made by married couples as to the composition of their family are cloaked with constitutional protection from enforcement of any zoning restriction requiring consanquinity among occupants of a residence.

* * * *

APPENDIX F (2)

[BRIEF OF APPELLEE]

* * * *

Ohio also has examined the same type of use as proposed here by The Villages and found it to be constitutionally protected. *Saunders v. Clark Cty. Zoning Dept.*, (1981) 66 Ohio St. 2d 259, 421 N.E.2d 152. The constitutional guarantees of "natural rights" and "due course of law" under the Indiana Constitution, Article 1, §§ 1 and 12, respectively, and of "due process of law" and "equal protection of the laws" under the Fourteenth Amendment, and of "freedom of association" under the First Amendment to the United States Constitution, protect the privacy and associational interests of a foster family against the kind of governmental instrusion [sic] sought to be imposed here by the Commission through administrative decision. The reasoning and authorities compelling application of these constitutional safeguards to the case at bar were summarized by the Ohio Supreme Court as follows:

> The definition of "family" in this resolution [zoning ordinance] is a broad one. In our view, any resolution seeking to define this term narrowly would unconstitutionally intrude upon an individual's right to choose the family living arrangement best suited to him and his loved ones. *Moore v. East Cleveland* (1977), 431 U.S. 494, 499, 97 S.Ct. 1932, 1935, 52 L.Ed.2d 531. Those loved ones can just as easily be foster children as natural children for parents with compassion. A state or local government cannot constitutionally invade the private realm of family life. *Wisconsin v. Yoder* (1972), 406 U.S. 205, 231-233, 92 S.Ct. 1526, 1541-1542, 32 L.Ed.2d 15; *Prince v. Massachusetts* (1944), 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645; *Village of Belle Terre v. Boraas* (1974), 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d

797, dissenting opinion of Marshall, J., at page 16, 94 S.Ct. at 1544. [Footnote omitted.] A family unit, which performs the social function of child-rearing, regardless of its relationship or composition or whether it includes foster children as well as natural children, is constitutionally protected against governmental intrusion not supported by a compelling governmental interest. *Smith v. Organization of Foster Families* (1977), 431 U.S. 816, 844-845, 97 S.Ct. 2094, 2109, 53 L.Ed.2d 14; *Wisconsin v. Yoder, supra*; *Meyer v. Nebraska* (1923), 262 U.S. 390, 399-401, 43 S.Ct. 625, 626-627, 67 L.Ed. 1042; 91 Harvard L.Rev. 1427, 1571-1574.

Saunders v. Clark Cty. Zoning Dept., (1981) 66 Ohio St. 2d 259, 421 N.E.2d 152, 155-156. Choices made by married couples as to the composition of their family, whether living in Ohio or Indiana, are cloaked with constitutional protection against the enforcement of zoning restrictions requiring consanquinity among residents of a home.

* * * *

APPENDIX F (3)

PETITION FOR REHEARING

* * * *

The question presented to this Court does have constitutional dimensions, because choices made by persons as to the composition of their family are constitutionally protected from government intrusion or regulation. The principal U.S. Supreme Court case relied upon by the majority, *Village of Belle Terre v. Boraas*, (1974) 416 U.S. 1, 96 S.Ct. 1536, dealt only with the power of a local government to enact a zoning ordinance regulating the number of unrelated *adults* composing a household. It was a college student housing case. It did not reach the question of the constitutional power of local government to regulate the internal relationship of adults and dependent children living as a family.

The second and later case cited by the majority, *Moore v. City of East Cleveland*, (1977) 431 U.S. 494, 97 S.Ct. 1932, 1944-45, is factually more akin to The Villages' type permanent home for children living as a single housekeeping unit. *Moore* illustrates and supports, rather than undercuts, The Villages' constitutional rights. It held *unconstitutional* a zoning ordinance which sought to regulate the composition of a family, and struck down a zoning ordinance which narrowly defined the biological relationship which must exist for children to live in a home. The instrusion [sic] into family life was easily recognizable in *Moore*. The same type of intrusion exists here where persons choose to offer a permanent home for foster children in a typical home setting. *Moore* recognizes that local government does have a legitimate interest in regulating the number of unrelated *adults*, because of problems of parking, traffic and density. But neither *Village of Belle Terre* nor *Moore* in any manner approves zoning ordinances which purport to ban certain types of families merely because blood ties do not exist.

Any doubt of this conclusion is put to rest by *Children's Home of Easton v. City of Easton*, (1980) 53 Pa. Cmwlth. 216, 417 A.2d 830. Faced with facts virtually identical to the case at bar, the court in *Easton* concluded:

> Contrary to the factual situation presented to the United States Supreme Court in *Belle Terre*, where six unrelated college students chose to live together for a temporary period of time as a matter of convenience, here we are concerned with a functional family unit which would promote the very values the United States Supreme Court held in *Belle Terre* to be worthy of preservation. . . .

417 A.2d at 832. Accordingly, *Easton* held an ordinance's restrictive definition of "family" to be arbitrary, unreasonable, and violative of the equal protection and due process clauses of the United States and state constitutions.

* * * *

APPENDIX F (4)

APPELLEE'S PETITION TO TRANSFER

* * * *

4. *Local zoning restrictions prohibiting the occupancy of a dwelling by a married couple and a reasonable number of foster children violate state and federal constitutional guarantees.* The majority opinion dismissed the constitutional dimensions of this case by citing the U.S. Supreme Court's opinion in *Village of Belle Terre v. Boraas*, (1974) 416 U.S. 1, 94 S. Ct. 1536. 464 N.E.2d at 368. At the same point, the majority also referred to the later case of *Moore v. City of East Cleveland*, (1977) 431 U.S. 494, 97 S. Ct. 1932. *Belle Terre* dealt only with the power of local government to regulate the number of unrelated *adults*. In contrast, *Moore* dealt specifically with the question of the constitutionality of a local zoning ordinance that purported to place limits upon arrangements between adults and dependent children who reside together as a single housekeeping unit. *Belle Terre* and *Moore* recognized the legitimate interest of local government in regulating the number of unrelated adults, because of problems of parking, traffic and density. But *Moore* struck down the zoning ordinance in question, because it narrowly defined the biological relationship that must exist among the adult residents and dependent children. The intrusion into family life was easily recognizable in *Moore*. The same type of intrusion exists here, where persons choose to offer a permanent residence for foster children in a traditional home setting. *Belle Terre* was analyzed recently in a case factually similar to the one at bar, *Children's Home of Easton v. City of Easton*, (1980) 53 Pa. Cmwlth. 216, 417 A.2d 830:

> Contrary to the factual situation presented to the United States Supreme Court in *Belle Terre*, where six unrelated college students chose to live together for a temporary period of time as a matter of con-

> venience, here we are concerned with a functional family unit which would promote the very values the United States Supreme Court held in *Belle Terre* to be worthy of preservation. . . .

417 A.2d at 832. Accordingly, *Easton* held an ordinance's restrictive definition of "family" to be arbitrary, unreasonable, and violative of the equal protection and due process clauses of the United States and state constitutions.

* * * *

APPENDIX F (5)

[BRIEF OF APPELLEE, THE VILLAGES, INC., IN SUPPORT OF PETITION FOR TRANSFER]

* * * *

(4) *Local zoning restrictions prohibiting the occupancy of a dwelling by a married couple and a reasonable number of foster children violate state and federal constitutional guarantees.* The Villages urges that there is no biological requirement in the Ordinance. But even if there were, it could not pass constitutional muster.

The constitutional guarantees of "natural rights" and "due course of law" under the Indiana Constitution, Article 1, §§ 1 and 12, respectively, and of "due process of law" and "equal protection of the laws" under the Fourteenth Amendment, and of "freedom of association" under the First Amendment to the United States Constitution, protect the privacy and associational interests of a foster family against the kind of governmental instrusion [sic] sought to be applied here. The Commission would restrict and regulate The Villages by interpreting family to mean persons related by blood and, thus, classify The Villages as an institutional rather than residential use of real estate. The majority opinion implicitly rejects the Commission's interpretation, but replaces it with the equally restrictive view that the accessory use section permitting foster family care prohibits the permanent-family use proposed by The Villages. Either view is equally violative of constitutional safeguards, because the effect is the same, *viz.* to make consanguinity a litmus test for areas zoned for one-family dwellings. The reasoning and authorities compelling application of the above-cited constitutional safeguards to The Villages' use were cogently summarized by the Ohio Supreme Court as follows:

> The definition of "family" in this resolution [zoning ordinance] is a broad one. In our view, any resolution seeking to define this term narrowly would

> unconstitutionally intrude upon an individual's right to choose the family living arrangement best suited to him and his loved ones. *Moore v. East Cleveland* (1977), 431 U.S. 494, 499, 97 S.Ct. 1932, 1935, 52 L.Ed.2d 531. Those loved ones can just as easily be foster children as natural children for parents with compassion. A state or local government cannot constitutionally invade the private realm of family life. *Wisconsin v. Yoder* (1972), 406 U.S. 205, 231-233, 92 S.Ct. 1526, 1541-1542, 32 L.Ed.2d 15; *Prince v. Massachusetts* (1944), 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645; *Village of Belle Terre v. Boraas* (1974), 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797, dissenting opinion of Marshall, J., at page 16, 94 S.Ct. at 1544. [Footnote omitted.] A family unit, which performs the social function of child-rearing, regardless of its relationship or composition or whether it includes foster children as well as natural children, is constitutionally protected against governmental intrusion not supported by a compelling governmental interest. *Smith v. Organization of Foster Families* (1977), 431 U.S. 816, 844-845, 97 S.Ct. 2094, 2109, 53 L.Ed.2d 14; *Wisconsin v. Yoder, supra*; *Meyer v. Nebraska* (1923), 262 U.S. 390, 399-401, 43 S.Ct. 625, 626-627, 67 L.Ed. 1042; 91 Harvard L.Rev. 1427, 1571-1574.

Saunders v. Clark County Zoning Dept., supra, 421 N.E. 2d at 155-156. Choices, therefore made by married couples as to the composition of their family, whether their children be natural, adoptive or foster, are cloaked with constitutional protection against a liberal interpretation of local zoning ordinances which requires consanquinity among residents of a dwelling. Decisions from New Jersey and Pennsylvania concur that federal and state constitutional guarantees extend to the residential use similar to the one established here by The Villages. *Y.W.C.A. of Summit, supra*; *Children's Home of Easton, supra.*

The majority opinion tries to dismiss the constitutional dimensions of this case by citing the U.S. Supreme Court's opinion in *Village of Belle Terre v. Boraas* (1974) 416 U.S. 1, 94 S. Ct. 1536. 464 N.E.2d at 368. Interestingly, the majority also refers at this same junction in its opinion to the later case of *Moore v. City of East Cleveland* (1977) 431 U.S. 494, 97 S. Ct. 1932. In contrast to *Belle Terre*, which dealt only with the power of local government to regulate the number of unrelated *adults* living in a residence, *Moore* dealt specifically with the question of the constitutionality of a local zoning ordinance that purported to place limits upon arrangements between adults and dependent children who reside together as a single housekeeping unit. *Moore* struck down the zoning ordinance in question, because it narrowly defined the relationship that must exist among the adult residents and dependent children. The intrusion into family life was easily recognizable in *Moore*, and the same type of rationale exists here, where persons choose to offer a permanent residence for foster children in a traditional home setting.

Belle Terre was analyzed recently in a case factually similar to the one at bar, *Children's Home of Easton v. City of Easton* (1980) 53 Pa. Cmwlth. 216, 417 A.2d 830:

> Contrary to the factual situation presented to the United States Supreme Court in *Belle Terre*, where six unrelated college students chose to live together for a temporary period of time as a matter of convenience, here we are concerned with a functional family unit which would promote the very values the United States Supreme Court held in *Belle Terre* to be worthy of preservation. . . .

417 A.2d at 832. Accordingly, Easton held an ordinance's restrictive definition of "family" to be arbitrary, unenforceable, and violative of the equal protection and due process clauses of the United States and state constitu-

tions. Although the text of the Ordinance does not contain language limiting "one-family" to a certain set of relationships, the Court of Appeals interprets the Ordinance in a fashion which does equal harm to the personal family interests protected in *Moore, Saunders* and *Children's Home of Easton, supra.*

* * * *

MOTION FILED
MAR 11 1985

No. 84-1294

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE VILLAGES, INC.,

Petitioner,

—v.—

THE METROPOLITAN DEVELOPMENT COMMISSION OF MARION COUNTY,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA, THIRD DISTRICT

MOTION FOR LEAVE TO FILE AND BRIEF OF NATIONAL ASSOCIATION OF HOMES FOR CHILDREN AS AMICUS CURIAE

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31 pp

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MOTION FOR LEAVE TO FILE AND BRIEF OF NATIONAL ASSOCIATION OF HOMES FOR CHILDREN AS AMICUS CURIAE

The National Association of Homes For Children (NAHC) respectfully moves pursuant to Rule 36.3 of the Rules of this Court for leave to file the annexed brief as *amicus curiae* in support of the position that the statute at issue, prohibiting a married couple and several foster children from residing together as a single housekeeping unit in a home situated in an area zoned for one family dwelling, is unconstitutional as applied to this particular residence. The consent of counsel for respondent Metropolitan Development Commission of Marion County to the filing of this brief was requested and refused.

This case presents to the Court for the first time the question of the constitutionality of a restrictive zoning ordinance as applied to a residence consisting of houseparents and foster children who, to all outward appearances, function as a family, except that they are not related by blood. cf. *Village of Belle Terre v. Boraas*, 416 U. S. 1, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974); *Moore v. City of East Cleveland*, 431 U. S. 494, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977).

The National Association of Homes For Children, the largest nation-wide organization in the field of group residential care for children, and consisting mainly of duly licensed child caring agencies* has a special interest in this matter—not only because its members care for children in various living arrangements on a daily basis, but also because the ordinance at issue, if upheld, could potentially affect living arrangements of children in foster care nationwide and cause substantial alterations of heretofore family-type living for thousands of youngsters who, through no fault of their own, but for the most part as the result of being abused, neglected or abandoned, are in a foster care system.

The basis of the Court's decision in this case will be of great importance in guiding both local communities and child caring agencies concerning future utilization of single family homes for foster children in areas zoned for one family occupancy. The Court will be assisted, the NAHC believes, by the broad perspective, based upon years of study and experience in all aspects of child care, which this *amicus* can provide. The parties to the case, while surely experienced in the state of Indiana, may not be as fully acquainted with the experience of other states and the issues which have been brought to the attention of other courts throughout the country in cases similar to the case at bar, as well as the overall historical perspective of various types of foster care.

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* See Appendix A for list of membership.

The NAHC believes that the attached brief will be of assistance to the Court in its consideration of the constitutional issues raised and therefore requests leave to file the annexed brief as *amicus curiae*.

Dated: March 1, 1985

Respectfully submitted

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Shapiro v. Thomson, 394 U.S. 618 (1969)	9
Village of Belle Terre v. Boraas, 416, U.S. 1 (1974)	ii, 5, 6, 11
Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)	7, 11

Other Authorities

Ainsworth and Fulcher (eds.): "Group Care For Children", Tavistock Publications (1981)	2
Citizen's Committee for Children of New York, Inc.: "The Foster Care Exit—Ready or Not" (1984)	2
Mayor's Task Force on Foster Care: "Redirecting Foster Care", New York City (1980)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1294

THE VILLAGES, INC.,

Petitioner,

—v.—

THE METROPOLITAN DEVELOPMENT COMMISSION OF MARION COUNTY,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF INDIANA, THIRD DISTRICT

BRIEF OF NATIONAL ASSOCIATION OF HOMES FOR CHILDREN AS AMICUS CURIAE

The National Association of Homes For Children respectfully submits this brief as *amicus curiae* in support of the position that the statute at issue, prohibiting a married couple and several foster children from residing together as a single housekeeping unit in a home situated in an area zoned for one family dwelling, is unconstitutional as applied to this particular residence.

Interest of *Amicus Curiae*

The interest of the National Association of Homes For Children (NAHC) is set forth in the preceding motion for leave to file this brief.

Introduction

The type of care provided for children whose parents are unable or unwilling to care for them has undergone profound changes over the last several decades. Large institutions in which such unfortunate children lived their early years *en masse*, sleeping in huge dormitories and overseen by masters and matrons have been largely consigned to history, although "sepia photographs recording this stage of the child care profession still cast a long shadow over annual reports of voluntary bodies and the corridors of institutions now trying to promote small living groups for the residents."[1] Indeed, virtually the entire emphasis in child care is on smaller living arrangements than heretofore.[2]

A child typically enters a foster care system through a voluntary placement by a parent or by court placement owing to neglect or abuse of the child.[3] If return to a parent is feasible, such return is accomplished. In many cases, however, return is delayed or indeed foreclosed for any of several reasons. In the meanwhile, the child will have resided somewhere within the foster care agency. Although living arrangements vary, basically a child usually resides in a foster home with one or two foster parents and perhaps other children, a residential treatment center or other institutional setting, or some other alternative setting.[4]

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1 "Group Care for Children" (ed. Ainsworth and Fulcher), Tavistock Publications, London and New York, 1981 (Forword, p. vii.).

2 Much emphasis is of course placed on preventive services (see, e.g., "Redirecting Foster Care", Mayor's Task Force on Foster Care, New York City, 1980). However, we are here concerned with children who are within a foster care system.

3 There are few true "foundlings", but occasionally one is "left on the doorstep" and in that manner enters the foster care system.

4 There are many thousands of children in foster care systems throughout the country. Indeed a study conducted in 1983 found that in New York City alone, some 18,000 children were in foster care. "The Foster Care Exit—Ready or Not", Citizens's Committee For Children of New York, Inc., 1984, p. 56.

One such alternative setting is a living arrangement whereby a limited number of children live in a simulated family atmosphere with an adult couple, approximating a normal family environment in the community. With this type of living arrangement, the children obtain many of the benefits of a home and family life which would otherwise be denied them.

The problem is the location of the homes. Although everyone sympathizes with the children, few want them as neighbors even though it is conceivable that some children could have originated from the same neighborhood. The homes have encountered the opposition of certain communities who have either cited existing local zoning laws or have hastily enacted such laws, which typically limit occupancy of one family houses in a "single family zone" to a small number of unrelated adults.

These communities have then contended that the home in question is not a single family use and, depending upon the community, either require a special permit in order to operate in the "single family zone" or attempt to exclude the home, typically because it is termed a boarding house.

There presently exists diversity in the several circuits with respect to whether the type of home in question qualifies as a family and thus constitutes a permitted use under the local statutes (*City of White Plains* v. *Ferraoli*, 34 N.Y. 2d 300, 357 N.Y.S. 2d 449, 313 N.E. 2d 756 1974), as well as whether such local statutes as seek to limit the use and occupancy of these premises violate constitutional guarantees such as due process and equal protection of law. In some cases, it has been argued that the states have pre-empted the issue by means of their involvement in the foster care system and that it is beyond the authority of local governments to enact legislation which would have the effect of undermining state regulation of the area. *Costley* v. *Caromin House, Inc.*, 313 N.W. 2d 21 (Sup. Ct. of Minn. 1981); *Hessling* v. *Broomfield*, 193 Colo. 124, 563 P. 2d 12 (Sup. Ct. of Colorado 1977); *Abbott House* v. *Village of Tarrytown*, 34 A.D. 2d 821, 312 N.Y.S. 2d 841 (App. Div., N.Y., 2nd Dept., 1970).

The case at bar, where both sides have cited cases from various parts of the country, points up the need for guidance by this Court in solving this very real and extremely important problem.

SUMMARY OF ARGUMENT

As shown in the introduction, there is a compelling need for guidance by the Court in this field. State appeals courts have made conflicting rulings in cases similar to the case at bar and uncertainty exists concerning vital questions of child care, an ever-increasing concern to virtually every community. A decision which appropriately sets forth a clear, generally applicable principle to determine the validity of zoning ordinances such as the one under consideration here can eliminate this harmful uncertainty.

As shown in Subdivision A of the Argument, the ordinance is unconstitutionally vague, as it fails to define the term "family", which forms the crux of the ordinance. This results in a failure to afford persons of ordinary intelligence reasonable opportunity to know what is prohibited, arbitrary and discriminatory enforcement of the ordinance, and an inhibiting of constitutionally protected activity.

As shown in Subdivision B, the zoning ordinance constitutes a violation of due process of law. As applied to exclude these children from the subject premises, the ordinance serves none of the purposes of local zoning ordinances—it does not serve to promote health, safety, morals or the general welfare of the community. There is no showing of any potential harm to the community from the existence of this home, and efforts to exclude it on zoning grounds constitute a patent denial of the due process rights of the children, as well as the sponsoring agency.

As shown in Subdivision C, the ordinance is violative of the agency's and the children's rights to equal protection of law. As the right of children to live free of institutional settings is

involved, a liberty interest is at stake. In addition, the basic right of association is at stake. Both of these require that the community show a compelling governmental interest, the absence of which voids the statute. Even under the less stringent standard the ordinance fails, as there is no rational furthering of a legitimate, articulated governmental interest by virtue of the exclusion of this home.

ARGUMENT

THE ORDINANCE IS UNCONSTITUTIONAL AS APPLIED TO THIS LIVING ARRANGEMENT

Although the Supreme Court held facially valid an ordinance regulating the number of unrelated adults living in a residence (*Village of Belle Terre v. Boraas*, 416 U.S.1, 94 S.Ct. 1536, 39 L. Ed. 2d 797 (1974)), it has not faced this issue with regard to a residence which to all outward appearances functions like a family, except that its members are unrelated by blood. Indeed, in *Moore v. City of East Cleveland*, 431 U. S. 494, 97 S.Ct. 1932, 52 L. E. 2d 531 (1977), the Court did not hesitate to invalidate a zoning ordinance which attempted to narrowly define the relationship that the community felt must exist among adults and children in a living arrangement. In *Moore* the ordinance had limited occupancy of a dwelling unit to members of a single family and limited such family to a few categories of related individuals. The ordinance in question in the case at bar violates several constitutional provisions in its application to the Indiana home.

A

THE ORDINANCE AT ISSUE IS UNCONSTITUTIONALLY VAGUE

This Court has held that vague statutes may offend the Constitution in three ways: (1) they may trap the innocent by failing to give a person of ordinary intelligence reasonable

opportunity to know what is prohibited so that he may act accordingly; (2) they may result in arbitrary and discriminatory enforcement in the absence of explicit guidelines for their application; and (3) where they implicate First Amendment freedoms, they may inhibit constitutionally protected activity. *Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2298-99, 33 L. Ed. 2d 222 (1972).

This statute offends the Constitution in all three ways. The statute deals with one and two family dwellings, restricting certain areas to one family. Yet nowhere in the statute is there a definition of the term "family"! It is inexplicable that this statute fails to define a term which in effect forms the crux of the statute.

In *Boraas supra* the ordinance defined a family as one or more persons related by blood, adoption or marriage, or not more than two unmarried persons living and cooking together as a single housekeeping unit under one roof and utilizing one set of facilities. That statute was thus quite specific in its definition of "family". Likewise, a New York ordinance limited "family" to a spouse, parents, grandparents, grandchildren, children or siblings living together as a single houskeeping unit with kitchen facilities. *City of White Plains v. Ferraoli*, 34 N.Y. 2d 300, 357 N.Y.S. 2d 449, 313 N.E. 2d 756 (1974). While, of course, the ordinances in the various communities which have reached the courts are too numerous to enumerate, the word "family" is invariably defined. Here, however, it is not, as the result of which: (1) the Villages has not been given reasonable opportunity to know what is prohibited; (2) the ordinance has resulted in arbitrary and discriminatory enforcement against this home; and (3) the ordinance impedes constitutionally protected activity. Thus each of the facets cited by this Court in *Grayned v. City of Rockford* is present here, rendering the statute unconstitutional.

B

THIS ZONING ORDINANCE CONSTITUTES A VIOLATION OF DUE PROCESS OF LAW

It is hornbook law that local zoning ordinances, usually authorized by town of village laws, have as their exclusive purpose the promoting of health, safety, morals, or the general welfare of the community. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365,47 S.Ct. 114, 71 L. Ed. 303 (1926); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61,101 S.Ct. 2176, 68 L. Ed. 2d 671 (1981).

As applied to exclude these children from the subject premises and compel them to reside in an institution, the ordinance serves none of these specified purposes. Moreover, and perhaps ironically, the health, safety and morals of children in group homes are carefully supervised; the home must be a healthful environment and meet rigid safety standards, including local building and fire codes.[5] As to the general welfare of the community, it should be emphasized that these children are not in this house because they have been charged with crimes, nor do they present any danger or detriment to the community different from a family with the like number of children of the same age as these. The fact that they are not related by blood in no manner increases the likelihood of detriment to the general welfare of the community. These children are in this home because their parents are unwilling or unable to care for them; some are abused, some neglected. Nowhere in this entire record is there the merest showing that this home or others like it present a threat of harm to the community, be it the health, safety or general welfare. Thus exclusion of the home constitutes a deprivation of property without due process of law. As the Supreme Court of New Jersey aptly stated in *Berger v.*

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5 As these homes are under the aegis of state departments of social services, it is the state which will normally see to it that such standards are met.

State of New Jersey, 71 N.J. 206, 364 A. 2d 993, 1002 (1976), a case involving the attempt by a local community to exclude a group home for multi-handicapped pre-school children as violative of local zoning:

> "Nevertheless, while municipalities are free to zone in such a way as will best attain these values, and to prohibit from such areas any use which threatens to erode such values or destroy the residential character of the area, all restrictions must, at the same time, satisfy the demands of due process. Substantive due process requires that zoning regulations be reasonably exercised; they may be neither unreasonable, arbitrary nor capricious. The means chosen must have a real and substantial relation to the end sought to be achieved. Moreover, the regulation must be reasonably designed to resolve the problem without imposing unnecessary and excessive restrictions on the use of private property."

C

THE ORDINANCE IS VIOLATIVE OF THE AGENCY'S AND THE CHILDREN'S RIGHTS TO EQUAL PROTECTION OF LAW

The basic test with respect to equal protection has been stated quite simply by this Court: When different groups are treated differently, the classifications must be reasonable and just in terms of the objective of the statute:

> "Classifications must always rest upon some difference which bears a reasonable and just relationship to the act in respect of which the classification is proposed and can never be made arbitrarily and without any such basis." *McLaughlin v. Florida*, 379 U.S. 184, 190, 85 S.Ct. 283 13 L. Ed. 2d 222 (1964).

The Court has set up two standards in assessing the constitutional validity of statutes under the equal protection law. These depend upon the right infringed upon as well as the existence

of a discriminatory classification. *Plyer v. Doe*, 457 U.S. 202, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982) (Concurring opinion by *Blackmon, J.*). Where invidious discrimination is present, in the form of a patently suspect classification, or where the exercise of a fundamental constitutional right is at issue, strict judicial scrutiny is required, *Shapiro v. Thomson*, 394 U. S. 618 89 S.Ct. 1322, 22 L. Ed. 2d 600 (1969), and a compelling state interest must be shown in order to sustain the statute. Where no such issue is involved, the test is whether the statute rationally furthers some legitimate articulated state purpose. *Shapiro v. Thomson, supra.*

In our case, we urge that the strict judicial scrutiny test is required as the exercise of fundamental constitutional rights is at issue.

The first of these rights is liberty. The record is clear that should this facility be forced to close, it is probable that the children involved would be compelled to reside in institutional facilities.

This Court has discussed the concept of "liberty" in *Moore v. City of East Cleveland, supra* in which it invalidated an ordinance which limited occupancy of a dwelling unit to members of a single family, and limited such family to a few categories of related individuals. In invalidating the Cleveland ordinance, the Court, quoting Justice Harlan's dissenting opinion in *Poe v. Ullman*, 367 U. S. 497, 543, 81 S. Ct. 1752, 1776-7, 6 L. Ed. 2d 989, 1019 (196l), stated:

> ". . . [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless

> restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." *Moore v. City of East Cleveland, supra*, at 502.

The ordinance at issue here as enforced against this home would deprive its members of the liberty of residing in a family-like setting and is thus constitutionally impermissible.

In addition, the ordinance restricts the freedom of association guaranteed by the Constitution. See *NAACP v. Burton*, 371 U. S. 415, 83 S. Ct. 328, 9 L.E. 2d 405 (1963). Should this home be compelled to close, its members would have little say in where and with whom they would reside. Nor would the moving of the entire household to another neighborhood solve the problem, as such moves to an appropriate setting can seldom be accomplished *en masse*.

Since these constitutionally guaranteed rights are involved, we urge that the ordinance be considered in the light of the strict judicial scrutiny test and barring a compelling governmental interest, obviously absent here, that the ordinance be declared void. *Moore v. City of East Cleveland, supra*.

However, even should the less stringent test be applied, that of whether the ordinance rationally furthers some legitimate, articulated governmental interest, we urge that this ordinance fails to pass constitutional muster.

It must first be noted that the record is entirely devoid of any articulated purpose for the ordinance. However, even should such purpose be assumed by the Court, and even should this Court hold that the community has a proper purpose in limiting the uses in a zone to single family units, the ordinance may still be unconstitutional. Citing numerous cases from various states, the New York Court of Appeals in *City of White Plains v. Farraioli*, 34 N Y 2d 300, 313 N.E. 2d 757, while conceding that the city of White Plains had a proper purpose in limiting uses in a zone to single family units, went on to say (at 305):

> "But if it goes beyond to require that the relationships in the family unit be those of blood or adoption, then its definition of family might be too restrictive (see, *Kirsch Holding Company v. Borough of Manasquan*, 59 N. J. 241, 250, 281 A 2d 513, 518; *City of Des Plaines v. Trottner*, 34 Ill. 2d 432, 216 N. E. 2d 116 [per Schaefer, J.]; *Boston-Edison Protective Assn. v. Paulist Fathers*, 306 Mich. 253, 10 N. W. 2D 847."

Nor is Village of *Belle Terre v. Boraas*, *supra*, dispositive of this issue. *Belle Terre* held only that occupancy restrictions based upon biological family ties do not violate Federal First Amendment rights. However, it is well settled that to satisfy constitutional guarantees, the ordinance must be rationally related to a legitimate public purpose. *Village of Euclid v. Ambler*, *supra*.

What we have here is no more or less than a community effort to exclude these children so as to "immunize" it from youngsters who, often through no fault of their own, are placed in a facility. Such immunization and exclusion are constitutionally impermissible.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted to review the judgment of the Court of Appeals in Indiana. In the alternative, the petition should be held pending disposition of *City of Cleburne v. Cleburne Living Center* (No. 84-468).

Respectfully submitted,

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MEMBERSHIP OF NATIONAL ASSOCIATION OF HOMES FOR CHILDREN

APPENDIX A

Abbott House Inc.—Mitchell, South Dakota
Abilene Girls Home, Inc.—Abilene, Texas
Adriel School—West Liberty, Ohio
Advent Christian Home—Dowling Park, Florida
Adventure Bound School—Charlottesville, Virginia
Alaska Baptist Family—Anchorage, Alaska
Allendale School for Boys—Lake Villa, Illinois
American Children's Home—Lexington, North Carolina
American Home Finding Association—Ottumwa, Iowa
Amherst H. Wilder Foundation—St. Paul, Minnesota
Andrus Children's Home—Yonkers, New York
Archdeacon Gilfillan Center—Bemidji, Minnesota
Arden Shore Association—Lake Bluff, Illinois
Arizona Baptist—Phoenix, Arizona
Arizona Boys Ranch—Boys Ranch, Arizona
Arkansas Baptist Family—Little Rock, Arkansas
Assurance Home—Roswell, New Mexico
Bachman Memorial Home, Inc.—Cleveland, Tennessee
Baker Hall—Lackawanna, New York
Baptist Children's Home—Madill, Oklahoma
Baptist Children's Home—Oklahoma City, Oklahoma
Baptist Children's Home—Owasso, Oklahoma
Baptist Children's Home—San Antonio, Texas
Baptist Children's Homes—Thomasville, North Carolina
Baptist Children's Services—Philadelphia, Pennsylvania
Baptist Children's Village—Jackson, Mississippi
Baptist Home for Children—Bethesda, Maryland
Barat Human Services—Detroit, Michigan
Barium Springs Home for Children—Barium Springs, North Carolina
Bashor Home—Goshen, Indiana
Beacon House—Jasper, Alabama
Beckley Child Care Center—Beckley, West Virginia
Beech Acres-General—Cincinnati, Ohio
Bellefaire—Cleveland, Ohio

Bellewood Presbyterian Home—Anchorage, Kentucky
Berea Children's Home—Berea, Ohio
Bethany Children's Home—Womelsdorf, Pennsylvania
Bethany House, Inc.—Cordova, Maryland
Bethel Bible Village—Hixon, Tennessee
Boles Home for Children—Quinlan, Texas
Bowling Brook Home for Boys—Middleburg, Maryland
Boys & Girls Home—Lake Waccamaw, North Carolina
Boys Farm, Inc.—Newberry, South Carolina
Boys Haven of America—Beaumont, Texas
Boys Home of North Carolina, Inc.—Lake Waccamaw, North Carolina
Boys Home of the South, Inc.—Belton, South Carolina
Boys' Home, Inc.—Covington, Virginia
Boys Ranch—Gore, Oklahoma
Boys Ranch Town—Edmond, Oklahoma
Boys Ranch Town—Oklahoma City, Oklahoma
Boy's Republic—Farmington Hills, Michigan
Boys Village—Lake Charles, Louisiana
Boys Village, Inc.—Milford, Connecticut
Boys' Village, Inc.—Smithville, Ohio
Boysville of Michigan—Farmington Hills, Michigan
Boysville, Inc.—Converse, Texas
Brantwood-The Children's Home—Montgomery, Alabama
Brookland Plantation Home for Boys—Orangeburg, South Carolina
Brooklawn, Inc.—Louisville, Kentucky
Brooklyn Home for Children—Forest Hills, New York
Broyhill Home—Clyde, North Carolina
Buckner Baptist—Dallas, Texas
Buckner Baptist Benevolences—Dallas, Texas
Buckner Baptist Boys Ranch—Burnet, Texas
Buckner Children's Village—Beaumont, Texas
Buckner South Texas Center—San Antonio, Texas
Buckner West Texas Center—Lubbock, Texas
Burlington United Methodist Home—Burlington, West Virginia
Butterfield Youth Services, Inc.—Marshall, Missouri

Camp Oakland Youth Programs, Inc.—Oxford, Michigan
Campus House, Inc.—Kearney, Nebraska
Carmelite Home, Inc.—Wauwatosa, Wisconsin
Carrie-Steele Pitts—Atlanta, Georgia
Catholic Children's Home—Alton, Illinois
Cayuga Home For Children—Auburn, New York
Central Texas Children's Home—Buda, Texas
Chaddock Boys School—Quincy, Illinois
Charles L. Hall Youth Services—Bismarck, North Dakota
Cherokee Children's Home—Cherokee, North Carolina
Cherokee Home for Children—Cherokee, Texas
Child & Family Services—Saginaw, Michigan
Child Care Services—Charlotte, North Carolina
Child Center of Our Lady—St. Louis, Missouri
Children's Aid Society—Mercer, Pennsylvania
Children's Aid Society Home—Clearfield, Pennsylvania
Children's Farm Home of Oregon—Corvallis, Oregon
Children's Home—Binghamton, New York
Children's Home—Winston-Salem, North Carolina
Children's Home of Burlington County—Mt. Holly, New Jersey
Children's Home of Cedar Rapids—Cedar Rapids, Iowa
Children's Home of Detroit—Grosse Pointe Woods, Michigan
Children's Home of Easton—Easton, Pennsylvania
Children's Home of Jefferson County—Watertown, New York
Children's Home of Lubbock—Lubbock, Texas
Children's Home of Poughkeepsie—Poughkeepsie, New York
Children's Home of Wheeling, Inc.—Wheeling, West Virginia
Children's Home of York—York, Pennsylvania
Children's Services—Syracuse, New York
Children's Services, Inc.—Amarillo, Texas
Children's Village—Tyler, Texas
Christian Appalachian Project—Nicholasville, Kentucky
Christian Church Children's—Danville, Kentucky
Christian Family Services, Inc.—Gainesville, Florida
Christian Haven Homes—Wheatfield, Indiana
Christian Home—Mt. Dora, Florida
Christian Home Association—Council Bluffs, Iowa

Christie School—Marylhurst, Oregon
Coastal Bend Youth City—Corpus Christi, Texas
Connie Maxwell Children's Home—Greenwood,
South Carolina
Covenant Children's Home—Princeton, Illinois
Covington Protestant—Covington, Kentucky
Crossnore School, Inc.—Crossnore, North Carolina
CROSSROAD—Fort Wayne, Indiana
Cumberland Presbyterian—Denton, Texas
Cummings Zucker Center—Toledo, Ohio
Dakota Boys Ranch—Minot, North Dakota
David & Margaret Home for Children—LaVerne, California
Davis-Stuart, Inc.—Lewisburg, West Virginia
Denver Children's Home—Denver, Colorado
Dept. of Child Care—Oklahoma City, Oklahoma
Double-K-Ranch—Seattle, Washington
Eagle Boys Village, Inc.—Hersey, Michigan
East Texas Guidance Center, Inc.—Tyler, Texas
Eckert Youth Homes—Williston, North Dakota
Edgefield Lodge, Inc.—Troutdale, Oregon
Edgewood Acres—Grand Rapids, Michigan
El Pueblo Boys Ranch—Pueblo, Colorado
Eliada Homes, Inc.—Asheville, North Carolina
Elks Aidmore Children's Home—Conyers, Georgia
Elon Home For Children—Elon College, North Carolina
Episcopal Child Care Services—Charlotte, North Carolina
Episcopal Church Home for Children—York, South Carolina
Epworth Children's Home—Columbia, South Carolina
Epworth Village, Inc.—York, Nebraska
Evangelical Children's Home—St. Louis, Missouri
Excelsior Youth Center—Spokane, Washington
Fair Haven Children's Home—Strafford, Missouri
Falcon Children's Home, Inc.—Falcon, North Carolina
Family and Children's Center, Inc.—Mishawaka, Indiana
Family Services—Minneapolis, Minnesota
Father Flanagan Boy's Home—Boy's Town, Nebraska
Father Maloney's Boys' Haven—Louisville, Kentucky

Five Acres-The Boys' & Girls'—Altadena, California
Five Points Campus—Pomona, New York
Flat Rock Children's Home—Flat Rock, Ohio
Florence Crittenton—Wheeling, West Virginia
Florida Baptist—Miami, Florida
Florida Baptist Children's Home—Lakeland, Florida
Florida Baptist Children's Home—Lakeland, Florida
Florida Baptist Children's Home—Tallahassee, Florida
Florida Sheriffs Boys Ranch—Boys Ranch, Florida
Florida Sheriffs' Girls Villa—Bartow, Florida
Florida Sheriffs Youth Camp—Barberville, Florida
Florida Sheriffs Youth Fund, Inc.—Boys Ranch, Florida
Florida Sheriffs Youth Ranch—Safety Harbor, Florida
Florida United Methodist—Enterprise, Florida
Frances E. Willard Home, Inc.—Tulsa, Oklahoma
Friends Association for Care—West Chester, Pennsylvania
Gateway United Methodist Youth Center—Williamsville, New York
Georgia Baptist Children's Home—Baxley, Georgia
Georgia Baptist Children's Home—Meansville, Georgia
Georgia Baptist Children's Home—Palmetto, Georgia
Georgia Baptist Children's Home, Inc.—Atlanta, Georgia
Georgia Sheriff's—Dalton, Georgia
German Children's Home—Catonsville, Maryland
Gibault School for Boys—Terre Haute, Indiana
Girls' Haven—Huntersville, North Carolina
Glenwood School for Boys—Glenwood, Illinois
Grandfather Home for Children—Banner Elk, North Carolina
Greer-Woodycrest Children's Services—Millbrook, New York
Griffith Center, Inc.—Golden, Colorado
Group Homes for Children, Inc.—Montgomery, Alabama
Guadalupe Home for Boys—Yucaipa, California
Guadalupe Home for Boys, Inc.—Redlands, California
Guardian Angel Home—Joliet, Illinois
Gustavus Adolphus Children's Home—Jamestown, New York
Hannah Neil Center for Children—Columbus, Ohio
Harris Home for Children—Huntsville, Alabama
Haven of Rest—Belton, South Carolina

Henderson Settlement—Frakes, Kentucky
Hendrick Home for Children—Abilene, Texas
High Plains Children's Home—Amarillo, Texas
High Sky Girls Ranch—Midland, Texas
Highfields, Inc.—Onondaga, Michigan
Highland Heights—New Haven, Connecticut
Hillcrest Family Services—Dubuque, Iowa
Hillside Cottages, Inc.—Atlanta, Georgia
Hillsides—Pasadena, California
Hillview Acres—Chico, California
Holly Hill Children's Home—Cold Spring, Kentucky
Holston United Methodist Home—Greeneville, Tennessee
Home of the Good Shepherd—St. Paul, Minnesota
Honey Creek Christian Homes—Lowell, Michigan
Hope Center for Youth—Houston, Texas
Hoyleton Children's Home—Hoyleton, Illinois
Hudelson Baptist Children's Home—Centralia, Illinois
Hughes Memorial Home for Children—Danville, Virginia
I.O.O.F. Children's Home—Corsicana, Texas
Idaho Youth Ranch—Boise, Idaho
Indiana Children's—Ladoga, Indiana
Indiana United Methodist—Lebanon, Indiana
Inter-Mountain Deaconess Home—Helena, Montana
J Bar D Boy's Ranch—Ione, Washington
Jack & Ruth Eckerd—Clearwater, Florida
Jackson Field Episcopal Girl's Home—Jarratt, Virginia
James Barry-Robinson Institute—Norfolk, Virginia
Jemez House, Inc.—Alcalde, New Mexico
John K. Crosswell Home—Sumter, South Carolina
Joy Ranch, Inc.—Hillsville, Virginia
Kemmerer Village—Assumption, Illinois
Kenai Peninsula Community Care Center—Kenai, Alaska
Kennedy Home—Kinston, North Carolina
Kentucky Baptist Board of Child Care—Middletown, Kentucky
Ketchikan Children's Home—Ketchikan, Alaska
Kodiak Baptist Mission, Inc.—Kodiak, Alaska
La Crosse Home for Children—La Crosse, Wisconsin

Lake County Boys' Ranch—Altoona, Florida
Lakeside Boys & Girls Home—Kalamazoo, Michigan
LaSalle School, Inc.—Albany, New York
Lee and Beulah Moor Children's Home—El Paso, Texas
Lee County Youth Development Center—Opelika, Alabama
Lena Pope Home, Inc.—Fort Worth, Texas
Little City Foundation—Chicago, Illinois
Long Beach Youth Center, Inc.—Long Beach, California
Longview—Buffalo, New York
Louisiana Baptist Children's Home—Monroe, Louisiana
Lourdesmont School—Clarks Summit, Pennsylvania
LSS Friendship House—Minneapolis, Minnesota
Lutheran Child & Family—Bay City, Michigan
Lutheran Social Services—Sioux Falls, South Dakota
Lutherwood—Indianapolis, Indiana
MacDonell United Methodist—Houma, Louisiana
Madonna Heights Services—Huntington, New York
Mankato Group Home—Mankato, Minnesota
Manuelito Navajo Children's Home, Inc.—Gallup, New Mexico
Maple Shade Residential Homes, Inc.—Salisbury, Maryland
Maude Carpenter Children's Home—Wichita, Kansas
McAuley Home for Girls—Buhl, Idaho
McCrossan Boy's Ranch—Sioux Falls, South Dakota
McQuade Foundation—New Windsor, New York
Memphis Boys Town, Inc.—Memphis, Tennessee
Mercy Boys Home—Chicago, Illinois
Methodist Board of Child Care—Baltimore, Maryland
Methodist Home—Macon, Georgia
Methodist Home—Waco, Texas
Methodist Home for Children—Raleigh, North Carolina
Methodist Home of Kentucky, Inc.—Versailles, Kentucky
Mid-Western Children's Home—Pleasant Plain, Ohio
Miller Home of Lynchburg—Lynchburg, Virginia
Missouri Baptist Children's Home—Bridgeton, Missouri
Missouri Girls Town Foundation, Inc.—Kingdom City, Missouri
Monroe Harding Children's Home—Nashville, Tennessee

Morning Star Boys' Ranch—Spokane, Washington
Mount Saint John—Deep River, Connecticut
Murphy-Harpst—Cedartown, Georgia
Myron Stratton Home—Colorado Springs, Colorado
Nazareth House—Raleigh, North Carolina
New England Kurn Hattin Homes—Westminster, Vermont
New Horizons Ranch & Center, Inc.—Goldthwaite, Texas
New Mexico Baptist Children's Home—Portales, New Mexico
New Mexico Boys Ranch, Inc.—Boys Ranch, New Mexico
New Mexico Christian Children's Home—Portales, New Mexico
Niles Home for Children—Kansas City, Missouri
Nome Receiving Home, Inc.—Nome, Alaska
Norris Adolescent Center—Mukwonago, Wisconsin
North Carolina Child—Lexington, North Carolina
North Idaho Children's Home—Lewiston, Idaho
Northeast Parent & Child Society—Schenectady, New York
Northwood Children's—Duluth, Minnesota
NYS Council of Voluntary—New York, New York
Ohio Assoc. of Child Caring Agencies—Columbus, Ohio
Oklahoma United Methodist Home—Tahlequah, Oklahoma
Our Lady of Victory Infant Home—Lackawanna, New York
Pacific Lodge Boys' Home—Woodland Hill, California
Palmer Home for Children—Columbus, Mississippi
Parent & Child Development—Savannah, Georgia
Patrick Henry Boys Plantation, Inc.—Brookneal, Virginia
Paul Anderson Youth Home—Vidalia, Georgia
Paul Anderson Youth Home—Lewisville, Texas
Presbyterian Child Welfare Agency, Inc.—Buckhorn, Kentucky
Presbyterian Children's Home—Austin, Texas
Presbyterian Children's Home—Wytheville, Virginia
Presbyterian Family Services, Inc.—Little Rock, Arkansas
Presbyterian Home for Children—Farmington, Missouri
Presbyterian Home, Inc.—Lynchburg, Virginia
Presbyterian Hospitality House—Fairbanks, Alaska
Rancho Damacitas—Rancho California, California
Randolph Children's Home—Randolph, New York

Real Life Children's—Okeechobee, Florida
Robert Boyd Ward Home—Pittsburgh, Pennsylvania
Rodeheaver Boys'—Palatka, Florida
Rood House Group Home—Mt. Vernon, Kentucky
Rosalie Manor Mary Center West—Brookfield, Wisconsin
Rosemont School, Inc.—Portland, Oregon
Sacred Heart Home—Pueblo, Colorado
Saint Anne Institute—Albany, New York
Salem Children's Home—Flanagan, Illinois
Salesmanship Club Youth—Dallas, Texas
Salvation Army Home for Girls—San Antonio, Texas
San Felipe del Rio, Inc.—San Cristobal, New Mexico
San Felipe del Rio, Inc.—Taos, New Mexico
Sangralea Valley—Onward, Indiana
Seagrave House, Inc.—Orlando, Florida
Sheriffs Youth Programs—Austin, Minnesota
Sheriffs Youth Programs—Austin, Minnesota
Sheriffs Youth Programs—Isanti, Minnesota
Sherwood & Myrtie Foster Home—Stephenville, Texas
Silver Springs—Plymouth Meeting, Pennsylvania
Sipe's Orchard Home, Inc.—Conover, North Carolina
St. Aemilian Child Care Center, Inc.—Milwaukee, Wisconsin
St. Anne's Infant Home—Spokane, Washington
St. Ann's Home—Tacoma, Washington
St. Colman's Home—Watervliet, New York
St. John's Children's Home—Kansas City, Kansas
St. John's Home—Painesville, Ohio
St. John's School for Boys—White Water, California
St. Joseph Catholic Orphan Society—Louisville, Kentucky
St. Joseph's Children's Home—Oklahoma City, Oklahoma
St. Joseph's Home For Boys—St. Louis, Missouri
St. Joseph's Villa—Richmond, Virginia
St. Joseph's Villa of Rochester, Inc.—Rochester, New York
St. Mary's Boys Home—Beaverton, Oregon
St. Mary's Home—Savannah, Georgia
St. Michael's Farm for Boys, Inc.—Picayune, Mississippi
St. Peter-St. Joseph—San Antonio, Texas
St. Rose Residence, Inc.—Milwaukee, Wisconsin

St. Vincent's Home—Saginaw, Michigan
St. Vincent's Home—Fall River, Massachusetts
St. Vincent's Services, Inc.—Brooklyn, New York
Stanford Lathrop Memorial Home—Sacramento, California
Starr Commonwealth for Boys—Van Wert, Ohio
Still Creek Ranch—Bryan, Texas
Sugar Creek Children's Center, Inc.—Philippi, West Virginia
Summit Oaks Center—Sioux Falls, South Dakota
Sunburst Youth Homes, Inc.—Neillsville, Wisconsin
Sunny Glen Children's Home—San Benito, Texas
Sunny Ridge Family Center, Inc.—Wheaton, Illinois
Syntaxis, Inc.—Gahanna, Ohio
Tara Hall,—Georgetown, South Carolina
Teen Acres, Inc.—Sterling, Colorado
Teen Ranch Inc.—Marlette, Michigan
Tennessee Baptist Children's—Franklin, Tennessee
Tennessee Baptist Children's Home—Chattanooga, Tennessee
Tennessee Baptist Children's Homes—Memphis, Tennessee
Tennessee Baptist Children's Homes, Inc.—Brentwood, Tennessee
Texas Baptist Children's Home—Round Rock, Texas
Texas Baptist Home for Children—Waxahachie, Texas
The Cedar's, Inc.—Lincoln, Nebraska
The Children's Home of Cromwell—Cromwell, Connecticut
The Children's Home of Reading—Reading, Pennsylvania
The Children's Home, Inc.—Tampa, Florida
The Connecticut Jr. Republic—Litchfield, Connecticut
The Curtis Home—Meriden, Connecticut
The Elizabeth Lund Home, Inc.—Burlington, Vermont
The Hutton Settlement—Spokane, Washington
The JANUS Project—Salt Lake City, Utah
The Lutheran Orphan's—Toledo, Ohio
The Methodist Children's Home—Jackson, Mississippi
The Presbyterian Home for Children—Talladega, Alabama
The Salvation Army—Anchorage, Alaska
The Salvation Army—St. Paul, Minnesota
The Salvation Army Services—Detroit, Michigan
The South Texas Children's Home—Beeville, Texas

The Starr Commonwealth Schools—Albion, Michigan
The United Methodist Children's Home—Decatur, Georgia
The United Methodist Home—Mechanicsburg, Pennsylvania
The Young House—Burlington, Iowa
Third Way Center—Denver, Colorado
Thornwell Home and School—Clinton, South Carolina
Three Rivers Youth—Pittsburgh, Pennsylvania
Timothy Hill Children's Ranch—Riverhead, New York
Todd-Phillips—Detroit, Michigan
Trinity School for Children—Ukiah, California
Triple H—Tacoma, Washington
Try House Center—Marshall, Minnesota
Tulsa Boys Home—Tulsa, Oklahoma
Tupelo Children's—Tupelo, Mississippi
Turning Point Boys Ranch—Willow, Alaska
United Methodist Children's—Richmond, Virginia
United Methodist Children's Home—Mount Vernon, Illinois
United Methodist Children's Home—Worthington, Ohio
United Methodist Youthville—Newton, Kansas
United Presbyterian Children's Home—Waxahachie, Texas
United Presbyterian Home for Children—Mars, Pennsylvania
UTA Halee Girl's Village—Omaha, Nebraska
Utah Girls Village, Inc.—Salt Lake City, Utah
Vera Lloyd Children's Home—Monticello, Arkansas
Veterans of Foreign Wars National Home—Eaton Rapids, Michigan
Village of St. Joseph—Atlanta, Georgia
Virginia Baptist Children's Home—Annandale, Virginia
Virginia Baptist Children's Home—Hampton, Virginia
Virginia Baptist Children's Home—Richmond, Virginia
Virginia Baptist Children's Home—Salem, Virginia
Virginia Home for Boys—Richmond, Virginia
Waldo Burton Memorial Home—New Orleans, Louisiana
Waterford Country School, Inc.—Quaker Hill, Connecticut
Waverly Children's Home—Portland, Oregon
Webster-Cantrell Hall—Decatur, Illinois
West Virginia Child Care Assoc.—Huttonsville, West Virginia
Wiley House—Bethlehem, Pennsylvania

Woodfield Center—Beresford, South Dakota
Woodland Hills—Duluth, Minnesota
Woodland Home—Quincy, Illinois
Wyndham Lawn Home—Lockport, New York
Yellowstone Boys & Girls—Billings, Montana
Yellowstone Boys and Girls Ranch—Billings, Montana
YMCA Boys Home of Iowa—Johnston, Iowa
Youth Care Center—Evansville, Indiana
Youth Home of Victoria—Victoria, Texas
Youth Homes, Inc.—Little Rock, Arkansas
Youth Outreach, Inc.—Vancouver, Washington
Youth Residential Services—Akron, Ohio

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(3)

No. 84-1294

In The
Supreme Court of the United States
October Term, 1984

THE VILLAGES, INC.,

Petitioner,

v.

THE METROPOLITAN DEVELOPMENT COMMISSION OF MARION COUNTY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA, THIRD DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION

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RESTATEMENT OF QUESTION PRESENTED FOR REVIEW

The Commission respectfully disagrees with the Villages' statement of the question presented for review. The following is a more factually accurate statement of the question which would emerge from examination of the record below:

> Is the use of residentially zoned real estate by a corporation which hires and trains two adults to serve as houseparents and to live in a corporate-owned facility for the purpose of providing foster care (for a fee of $36.00 per day per child) to ten abused, abandoned, or neglected children selected and placed in the facility by the corporation permitted by the provisions of the Dwelling Districts Zoning Ordinance of Marion County, Indiana, which provisions authorize foster family care as an accessory use, but not as a primary use, of residentially zoned real estate?

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Dwelling Districts Zoning Ordinance, Code of Indianapolis and Marion County, Indiana	i, 2, 5, 6, 6 n.3, 7, 11

Respondent, The Metropolitan Development Commission of Marion County (hereinafter referred to as the "Commission"), respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the opinion issued below by the Court of Appeals of Indiana, Third District. That opinion is reported at 464 N.E.2d 367 and is contained as an appendix (Pet., 1a-16a) to the petition of The Villages, Inc. (hereinafter referred to as the "Villages"). The Commission accepts the sections of the Villages' petition titled Parties Below (Pet., i), Reports of Opinions Below (Pet., 1) and Jurisdiction (Pet., 2). The jurisdictional statement is accepted only to the extent it concerns jurisdictional and not substantive issues.

———o———

STATEMENT OF FACTS

The Villages is a Kansas not-for-profit corporation doing business in Indiana. The stated purpose of the corporation is to establish group homes, each of which is designed to provide foster care and housing to approximately ten (10) abandoned, abused, and neglected children in a setting which simulates a family environment (Pet., 2a, 19a). The foster care facilities are staffed by houseparents hired by the Villages to reside with children who are unrelated to the houseparents or to each other, and who are wards of a court or a government agency (Pet., 2a, 19a). Various government agencies pay the Villages approximately thirty-six dollars ($36.00) per day per child in return for the service which the Villages provides (Pet., 2a, 19a).

Prior to commencing operation of the foster care facility which is the subject of the instant cause, the Villages established facilities in Evansville, Bloomfield, and Bedford, Indiana. Those group homes were established in three (3) separate Indiana counties, and apparently each was established without any adverse encounter with the local zoning authorities. No evidence was introduced by the Villages to disclose whether any of the above listed Indiana cities serving as sites for Villages' facilities had zoning ordinances like, or similar to, the Dwelling Districts Zoning Ordinance of Marion County, or indeed if those communities had residential zoning ordinances at all. The facility which is the subject of this cause was the first Villages' group home opened in Marion County, Indiana.[1]

The chronology of events preceding the establishment of the group home at issue is instructive. The Villages entered an unconditional agreement to purchase the subject property in October, 1982 (Pet., 3, footnote 1). On or about November 19, 1982, a Villages' representative met with a Marion County zoning official[2] for the purpose

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[1] During the Commission's appeal of the trial court decision to the Court of Appeals of Indiana, the Villages commenced the operation of the facility in question. Shortly thereafter, the Villages opened a second group home in Marion County, and both facilities are presently staffed by houseparents, and each has a compliment of approximately ten (10) foster children.

[2] The meeting was held at the Villages' request and included a City-County Council member, a Villages' representative, and the Administrator of Marion County's Division of Planning and Zoning. The Administrator of Planning and Zoning was the appropriate official within Marion County to render opinions and positions relative to proposed uses and zoning classifications or zoning procedures necessary to authorize proposed uses of Marion County property.

of outlining and seeking sanction for the intended use of the real estate (Pet., 20a). Uncontroverted evidence at trial disclosed that the Villages' representative was informed during the November 19th meeting that the proposed group home could be established in a one-family zoning district only if a rezoning or a zoning variance was obtained (Pet., 20a). Thus, the Villages' assertion in its petition is accurate in pointing out that it was only after the Villages had entered an unconditional agreement to purchase the property in October, 1982, that Marion County zoning authorities first asserted that the proposed group home would constitute a zoning violation (Pet., 3, footnote 1). The Villages' claim is certainly misleading, however, because the Villages fails to point out that it was not until November, 1982, that zoning authorities were first asked by the Villages to render an opinion as to the use in question. There is no evidence in the record to suggest that any Marion County zoning official knew of the Villages' intended use of the subject real estate until at least several weeks after the Villages unconditionally committed itself to purchase the site.

During the first meeting between the Villages' representative and the Administrator of Planning and Zoning, the Villages was informed of the position of Marion County zoning authorities. That position never changed during the entire course of these proceedings. In fact, it was later reduced to writing (Pet., 20a, 21a).

Approximately seven (7) weeks following the meeting with the Administrator of Planning and Zoning, the Villages closed the purchase of the single family dwelling (Pet., 20a). Further meetings between Indianapolis (Marion County) zoning officials and Villages' representatives

in January and February, 1983, failed to resolve the parties' differences. After being informed of the Villages' intention to proceed with the development and use of the subject site for a group home (Pet., 21a), a lawsuit was filed seeking a preliminary and permanent injunction. Following the close of the evidence presented at the preliminary injunction hearing, the trial court consolidated the preliminary injunction hearing with the permanent injunction request and ruled in favor of the Villages, thus denying the Commission an injunction.

The Commission appealed the trial court decision to the Court of Appeals of Indiana, which Court reversed the lower court. The Villages petitioned the Supreme Court of Indiana to grant discretionary review. However, after entertaining oral argument and the parties' briefs, the Supreme Court of Indiana denied transfer.

Following remand to the trial court, the Villages' objected to the issuance of an injunction against the use of the subject real estate and asserted its entitlement to a further evidentiary hearing. The Commission objected to such an evidentiary hearing. This controversy was the subject of an oral argument presented to the Court of Appeals of Indiana in January, 1985. During argument, counsel for the Commission maintained that in view of the Court of Appeals' decision in favor of the Commission, an injunction should issue. However, the Commission suggested to the Court of Appeals that the effective date of the injunction be delayed until the summer of 1985 so that the foster children presently being housed in the subject facility might complete their school semesters without interruption. That proposal was ultimately adopted and an injunction subsequently issued requiring the

Villages to cease operation of the subject group home on and after June 30, 1985 (Pet., 7, footnote 2).

The Villages has been and remains eligible under applicable Indiana law to seek a rezoning of the property to a classification permitting charitable and philanthropic institutions. The Villages also is free to apply to Marion County's board of zoning appeals for a zoning variance. Ironically, the Villages was informed by the Administrator of Planning and Zoning during the November, 1982, meeting that the Marion County zoning staff probably would support a rezoning or variance petition filed by the Villages for the proposed foster home. Of course, the staff position was not guaranteed, and it could not be formulated until and unless such a petition was presented for analysis and consideration on its merits. Despite the expressed willingness of the zoning authorities to cooperate, however, the Villages has, until now at least, chosen not to seek either a rezoning or a variance. Rather, the corporation has voluntarily and steadfastly refused to utilize these available procedures.

REASONS WHY THE WRIT SHOULD BE DENIED

I. Neither The Decision Below Nor The Record Raises The Question Presented By The Villages.

Even if this Court answers the Question Presented by the Villages, the actual controversy existing between these litigants will be no closer to resolution. Despite the Villages' insinuation to the contrary, Marion County's Dwelling Districts Zoning Ordinance (hereinafter referred to as the "DDZO") permits "a married couple and several foster children [to reside] together as a single housekeeping unit in a home situated in an area zoned for one fam-

ily dwelling[s]." In fact, the DDZO specifically provides for foster family care as an *accessory* use in all one-family residential districts.[3] However, a requirement of the ordinance is that the foster family care be " . . . customarily incidental accessory and subordinate in area, extent and purpose to the primary use. . . ." (Pet., 43a).

In the case of a family who cares for foster children in order to supplement its own numbers, or to fill the void of children never born or now departed, these accessory use requirements are easily and routinely met in Marion County. However, where, as in the instant case, a corporation purchases and staffs a facility for the *sole* purpose of establishing a location at which the corporation may carry out its business of providing foster care in return for a fee, the Court of Appeals of Indiana correctly recognized foster care as the *primary* use of the property. Having done so, the Court of Appeals determined that the Villages' use was a violation of the DDZO.

II. The Decision Of The Court Of Appeals Rests Firmly Upon Indiana's Established Principles Dealing With Statutory Construction, And The Decision Presents No Substantial Federal Question.

In order to confirm that the decision below rests upon a construction of Indiana law, and not upon federal constitutional principles, one may begin by examining the trial court judgment. The trial court, which ruled in favor of the Villages, failed to address constitutional issues in

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[3] The DDZO also permits "Group homes, as regulated in section 2.18." However, all parties agree that the Villages' use does not fall within the definition of group home provided by the DDZO (Pet., 2a, footnote 1).

its findings of fact (Pet., 17a-21a) or in its conclusions of law (Pet., 21a, 22a). In pertinent part, the trial court concluded that:

> The use of the subject real estate by an organization which employs a married couple to work in said facility on an around the clock basis to provide care and shelter for abused, abandoned, or neglected children is a one-family dwelling use and therefore is a permitted primary use in a dwelling district zoned D-3 because such use fits within the plain and ordinary meaning of the term "family".
>
> Furthermore, the providing of care to foster children is contemplated by the ordinance by virtue of the fact that foster family care is expressly permitted under Section 2.15(10) of the Dwelling District [sic] Ordinance.

(Pet., 21a, 22a).

The above quoted language should make clear that the trial court based its decision on its belief (later determined to be in error) that the DDZO, not the United States Constitution, authorizes the Villages' use of the property. When the Court of Appeals of Indiana reversed the trial court judgment, the Court of Appeals expressly reached its decision based upon application of Indiana's rules of statutory construction. Early in its opinion the Court of Appeals concluded that " . . . the issue at bar is not constitutional in nature, but instead involves a question of statutory interpretation." (Pet., 3a). The Court of Appeals used firmly grounded and long established rules of statutory construction in analyzing the case and in reaching its decision. The following passage from the Court of Appeals' opinion lends useful insight into the Court's analysis of the issue presented:

> In this case, the legal maxim *expressio unius est exclusio alterius*[2] is particularly useful in ascertaining the legislative intent. In construing a statute, it is equally important to recognize what is not said as it is to recognize what is said. *Van Orman v. State*, (1981) — Ind.App. —, 416 N.E.2d 1301. In drafting the DDZO, the local legislative body promulgated separate and specific provisions for single-family dwellings and for foster care within the D-3 district. The specific provision for foster care as an accessory use necessarily excludes foster care from the general section authorizing single-family dwellings. Any other construction renders this specific regulation of foster care superfluous. Local legislators would not logically provide for foster care as an accessory use if it were also contemplated as a single-family dwelling use. The trial court erred as a matter of law in finding the Villages' group home to be a single-family dwelling.
>
> Nor does the group home qualify as an accessory use. Any accessory use must be subordinate in area, extent, and purpose to the primary use of the lot. The Villages is a corporation which intends to hire two houseparents to provide care for ten foster children. These children are placed in the group home under separate contracts, and The Villages is compensated at a rate of $36 per day per child. Obviously, foster care is not subordinate to, but actually is the primary use of the proposed group home. As such, the proposed group home is not permitted as an accessory use, nor is it allowed under any category within the D-3 district.[3]

(Pet., 4a, 5a, footnotes omitted).

III. The Decision Of The Court Of Appeals Is Consistent With This Court's Prior Decisions.

In its opinion, the Court of Appeals of Indiana looked to this Court's prior decisions for guidance. The Court

noted that in *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926), it was decided that local government may properly regulate the use of land by creating classifications designed to promote public health, safety, morals, and general welfare (Pet., 3a). Further, the Court of Appeals took cognizance of the decisions in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) and *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977) in which this Court recognized that it is constitutionally permissible for the police power of local units of government to be used to limit the number of unrelated individuals living in residential districts (Pet., 3a). Having satisfied itself that local government may constitutionally regulate occupancy of residential structures by unrelated individuals, the Court of Appeals concluded that the facts before it presented a question of statutory construction, and not a question of constitutional law (Pet., 3a).

In its petition the Villages cites numerous cases decided by this Court. Yet, none are directly on point, and none alter the *Village of Belle Terre* decision which upholds the right of local legislatures to impose restrictions on the number of unrelated individuals occupying a dwelling within a one-family dwelling area. Upon careful scrutiny, it is clear that virtually all of the Court decisions cited by the Villages, including those decided by the U.S. Supreme Court, are inapposite. This is true in part because the issue being argued by the Villages is not the issue which was decided in the instant case. An example of the Villages' misplaced argument follows:

> Finally, exclusion of foster families from single-family districts violates in a most basic fashion the rights of association, privacy, and family integrity of the foster parents and foster children and does not serve a countervailing compelling governmental interest.

(Pet., 9, citation omitted).

The Villages may be correct in its summarization of constitutional law, but the Villages has inaccurately depicted the facts of the instant case. Marion County has not excluded foster families from single-family districts. Instead, Marion County has excluded this particular corporate owned and operated foster care facility because it is clearly the *primary* use of the property in question. All foster family care which is *accessory* to a permitted primary use may be conducted in single-family districts in Marion County. This was true prior to the Court of Appeals' decision, and it remains true following that decision.

IV. The Facts Of This Case Are Peculiar, And This Case Is Unlikely To Have An Impact Upon Persons Other Than The Parties To This Action, Or Upon Localities Other Than Marion County, Indiana.

The trial judge specifically stated that the facts in the case at bar are peculiar, and the judge limited his ruling to the particular facts before him. The trial court wrote:

> In conclusion, however, it should be established that were the character of the use to change or expand beyond that which is proposed, then it might become an unpermitted use. Should it become less of a surrogate family and more of an institution, then an entirely different result could be expected. In that regard,

> therefore, the court expressly limits its decision to the particular facts found, as delineated in the courts [sic] findings, items 7 through 17.

(Pet., 31a).

Like the trial court, the Court of Appeals of Indiana reached its decision based upon a construction of Marion County's DDZO as applied to the specific facts of this case. The Court of Appeals adopted neither a broad and sweeping, nor a narrow and restrictive, definition of "family" which will stand as precedent in the State of Indiana. This case simply presented no need for the Court to fashion such a definition. Instead, the Court was required to, and did, engage in careful and highly individualized construction of a single zoning ordinance which pertains in only one (1) of Indiana's ninety-two (92) counties.

The Villages has made no claim, as it could not, that the continued existence of any of the Villages' foster care facilities in other Indiana counties is in any way affected by the instant decision. Those facilities continue to be governed by the zoning regulations in effect in the counties wherein the facilities operate. Simply stated, the question presented by the Villages in its petition, even if rephrased to appropriately reflect the factual circumstances of the instant cause, does not have the requisite public importance to warrant review by this Court. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923); *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1955). It is well established that certiorari should not be granted merely to review the facts of a case. *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 580 (1924); *United States v. Johnston*, 268 U.S. 220 (1925); *Rudolph v. United States*, 370 U.S. 269 (1962); and, *Tacon v. Arizona*, 410 U.S. 351 (1973).

CONCLUSION

The decision reached by the Court of Appeals of Indiana was dependent entirely upon the facts which the Court found, and the result is likely to impact only the parties to this appeal. The question below was carefully weighed and exhaustively treated by way of a lengthy trial court decision, a written Court of Appeals opinion, and consideration by the full five (5) member Supreme Court of Indiana which elected to deny transfer only after giving the parties an opportunity to present briefs and oral argument. The Villages received fair treatment during every stage of the proceedings. When the injunction becomes effective on June 30, 1985, the Villages will have operated the facility for approximately two (2) years. The Villages still has certain administrative remedies available under Indiana law by which the corporation may seek belated sanction for its group home. These remedies have been available to the Villages for the past two (2) years, and they will continue to be available between now and June 30th and beyond.

For all of the reasons set forth herein, the Commission respectfully prays that the petition be denied.

Respectfully submitted,

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